

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

No. 5481

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HERBERT PHILLIP SCHLANGER,  
*Petitioner,*  
*vs.*

ROBERT C. SEAMANS, JR.,  
Secretary of the Air Force, ET AL.,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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## RELEVANT DOCKET ENTRIES

1969

- Aug. 27 1. File Petition of Herbert Phillip Schlanger for Writ of Habeas Corpus
- Aug. 28 2. Enter and file Order that petition of Herbert Phillip Schlanger for writ of habeas corpus is denied.
- Aug. 29 3. File petitioner's motion for rehearing.
- Sept. 2 4. File memo on motion for rehearing, by petitioner's counsel.
- Sept. 5 — Minute Entry: Petitioners' motion for rehearing called. \* \* \* It is ordered that said motion is denied.
- Sept. 10 9. File petitioner's Notice of Appeal
- Dec. 18 10. File certified copy of Order from the Court of Appeals that the Order denying application of appellant for a writ of habeas corpus is set aside without prejudice and the cause is remanded to the district court for issuance of an order to show cause and further proceedings thereon.

1970

- Jan. 8 12. Enter and file Order that the respondents shall within 20 days from this date show cause why the application for writ of habeas corpus should not be granted or why a hearing should not be held on the merits of said application, by filing with this court such response as deemed appropriate. Further ordered that a copy of the verified application for writ of habeas corpus, along with a copy of this order be served upon each of the respondents and the U.S. Atty. by the U.S. Marshal.

## RELEVANT DOCKET ENTRIES

1970

- Jan. 9    13.    File certified copy of order from the Court of Appeals that appellees are stayed from removing appellant, or ordering or causing his removal, from the District of Arizona until proceedings in the district court pursuant to this court's mandate are completed, or until the further order of the district court.
- Jan. 27   16.    File respondents' motion to dismiss, with memo, and affidavits.
- Jan. 30   17.    File respondents' supplemental memo.
- Feb. 4    18.    File applicant's motion to set for trial, with affidavit \* \* \*.
- Feb. 6    19.    File Marshal's returns showing order and application served upon Colonel Homer Baker, Dr. Robert C. Seamans, Jr., Colonel Noel B. Reddrick and US Atty.
- Feb. 10   20.    Enter and file Order that the respondents' motion to dismiss the petition for lack of jurisdiction is granted; that respondents are stayed from removing petitioner from the District of Arizona pending a timely appeal to the Appeals court for the Ninth Circuit or until further order either of this court or the Court of Appeals.
- Feb. 13   24.    File applicant's Notice of Appeal.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Civ-69-381 Phx.

[File Endorsement Omitted]

UNITED STATES OF AMERICA EX REL.  
HERBERT PHILLIP SCHLANGER, APPLICANT

v.

Hon. Dr. ROBERT C. SEAMANS, JR., Secretary of the Air Force, Colonel HOMER BAKER, Commander, Moody AFB, Valdosta, Georgia, and Colonel NOEL B. REDDRICK, Commander, AFROTC Det 25, Arizona State University, Tempe, Arizona, RESPONDENTS

PETITION FOR A WRIT OF HABEAS CORPUS—  
Filed August 27, 1969

HERBERT PHILLIP SCHLANGER, relator herein, for his verified *application for a writ of habeas corpus* respectfully alleges as follows:

1. This action is brought pursuant to the provisions of 28 USC 2241 et seq.

2. Relator is being unlawfully detained and restrained of his liberty in violation of the Constitution and laws of the United States, as is more particularly alleged in the remainder of this application.

3. Applicant is a citizen of the United States and is a resident of the State of Arizona.

4. The Hon. Robert Seamans, Jr., Secretary of the AF and Colonel Homer Baker, Commander, Moody AFB, Georgia, are the persons who are at present unlawfully restraining applicant of his liberty, as is more fully particularized herewithin. Col. Reddrick is the ROTC commander at ASU.

5. On December 1962 applicant enlisted in the USAF for a period of four years pursuant to the terms of a

written agreement to which the court's attention is respectfully referred.

6. During 1965 applicant applied for entrance into the Airman's Education and Commissioning Program (hereinafter referred to as the "AECF") and in or about October, 1965 was notified by the Air Force Institute of Technology (hereinafter referred to as "AFIT") that he had been accepted for participation.

7. On November 9, 1965 orders were promulgated designating the applicant an "officer trainee" and reassigning him, effective on or about December 13, 1965, to Arizona State University for enrollment as a student under the AECF.

8. On December 8, 1965 applicant was discharged and, on December 9, 1965, was re-enlisted for a period of six years; this was accomplished solely that applicant might meet the retainability requirement for participation in the AECF.

9. The facts and circumstances leading to and culminating in the aforesaid unlawful detention have their genesis in the illegal, arbitrary and capricious enforcement of the aforesaid re-enlistment contract; the court's attention is specifically directed to its terms, conditions and limitations.

10. The re-enlistment contract of December 9, 1965, identified in paragraph 8 supra, was breached and rendered void by the illegal, arbitrary and capricious acts of certain Air Force offices, hereinafter identified; specifically the withdrawal of your applicant from the AECF on June 17, 1968 in a manner contrary to USAF regulations, directives and manuals, ignoring and violating applicant's rights to due process and on grounds which were factually unsupported, wholly inapplicable and violative of the First and Fifth Amendments to the Constitution of the United States.

11. Upon registration at Arizona State University a graduation date of May 1968 was forecast and an education plan outlining this proposed course of study was submitted to and approved by AFIT.

12. In or about February, 1968 applicant submitted to AFIT a revised education plan, necessitated by an ill-

ness which had disrupted applicant's anticipated progress, calling for a revised graduation date of August, 1968.

13. After careful consideration and review of applicant's performance in the AECP to that date and the request for an extension referred to in paragraph 11 supra, AFIT notified applicant, on March 25, 1968, of its approval of his aforementioned request.

14. By statement dated April 8, 1968, annexed as Exhibit 1 and not exhibited to applicant until in or about December, 1968, recommending applicant's withdrawal from the AECP, Major Graham W. Rider, AFIT Liaison Officer at Arizona State University, alleges that applicant admitted to him that he "had been cutting classes extensively ever since [applicant] had been [at the University]"; applicant denies ever having made such a statement.

15. Applicant received, less than twelve weeks following the extension approval referred to in paragraph 13 supra, a letter from Colonel Miles R. Palmer, Director, Civilian Institutions Division, AFIT, dated June 17, 1968 (annexed hereto as Exhibit 1A) informing him that the Commandant, AFIT, had withdrawn him from the AECP, ordering him into a state of arrest and severely restricting his rights of free speech.

16. On June 22, 1968 applicant acknowledged receipt of Colonel Palmer's letter and requested clarification of several points. Annexed hereto as Exhibit 2 is a true copy of that acknowledgement.

17. Having received no reply to his aforesaid letter, applicant sent a telegram, dated June 30, 1968 and annexed as Exhibit 3, to Colonel Palmer again requesting clarification and amplification of the stated reason for his withdrawal ("lack of officer potential") and the restraints imposed upon applicant's liberty and freedom of communication.

18. By letter dated July 5, 1968, annexed hereto as Exhibit 4, Lt. Col. Franklin Blanton replied to applicant's telegram; thereupon, applicant requested by telegram on July 12, 1968, annexed hereto as Exhibit 5, answers to ten specific questions relating to the withdrawal

procedure, the methods used in reaching the decision to withdraw him, and the consequences of the action.

19. By order dated July 10, 1968, annexed hereto as Exhibit 6, applicant was reassigned to Moody AFB and ordered demoted from his then current grade of E-5 to E-3 and relieved of duty as an "officer trainee".

20. The reply to applicant's telegram of July 12, 1968, annexed hereto as Exhibit 7, informed him of an alleged inquiry which had heretofore been purportedly conducted by the Professor of Aerospace Studies (hereinafter referred to as "PAS"), AFROTC Det 25 at Arizona State University, its supposed purpose and the authority under which it was allegedly conducted, to wit, AFR 120-3; according to said reply, the inquiry was concerned with applicant's alleged "lack of officer potential [as demonstrated] . . . by [applicant's] not attending all scheduled classes. . . ."

21. Applicant had no knowledge of any inquiry, hearing, investigation or any other proceeding heretofore described until receipt of Exhibit 7.

22. By letter forwarded on or about July 30, 1968 and annexed as Exhibit 10 applicant appealed to the Commandant, AFIT, for a hearing into the facts of the matter and for an opportunity to be heard on his own behalf.

23. By letter dated August 27, 1968 and annexed as Exhibit 11 the request for a hearing was denied.

24. By letter dated September 4, 1968, annexed hereto as Exhibit 12, applicant applied through proper military channels for a discharge and the Chief of Staff, USAF, in a letter dated October 29, 1968 and annexed as Exhibit 13, stated that this request had not been favorably considered.

25. The inquiry, referred to in paragraph 20 supra, could not have been legally or properly concerned with the matter which it did, in fact, undertake to investigate; section 1 of AFR 120-3, annexed hereto as Exhibit 8, specifically exempts investigations into courts-martial charges from its coverage; AWOL is a court-martial offense (Article 86, UCMJ) and, by directive definition, annexed as Exhibit 9, non-attendance at class is equivalent to failure to report for duty, i.e., AWOL.

26. Though AFR 120-3 requires that any inquiry conducted under its provisions be held at an "echelon of command compatible with an impartial, unbiased and complete presentation of facts", the PAS assigned responsibility for this inquiry had previously demonstrated his partiality and bias by endorsing Major Rider's letter (Exhibit 14) on April 9, 1968, or approximately five weeks prior to the inquiry, as follows: "I am familiar with this case and concur with the recommendation."

27. The reason given by AFIT for applicant's withdrawal, i.e., "lack of officer potential", was not a ground for such a withdrawal in accordance with the directives in force at all times relevant to this proceeding. It was added to the directive (the AFIT Student Manual) as a ground on July 1, 1968, or two weeks after the actions of the Air Force as specified above.

28. Since the aforementioned withdrawal applicant has been awarded an Oak Leaf Cluster (covering the period from December 7, 1965 to December 6, 1968) to his Good Conduct Medal, the citation of which commends his "exemplary behavior, efficiency and fidelity during the period indicated"; hardly, applicant respectfully points out, behavior consistent with AFIT's allegations.

29. On the basis of the foregoing, applicant respectfully alleges that the USAF's removal of him from the AECP, and the continuing restraint of applicant's liberties, was and is unlawful and violative of applicant's Constitutional rights in one or more of the following respects:

- i. It was illegal, arbitrary and capricious (paragraphs 15, 21, 23, 24 and 27)
- ii. It followed proceedings prejudicial to the applicant conducted under wholly inapplicable directives (paragraphs 25, 26 and 27)
- iii. The alleged reason was utterly without basis in demonstrated fact (paragraphs 14 and 28)
- iv. It was conducted in a manner contrary to USAF regulations, directives and manuals (paragraphs 25, 26 and 27)
- v. It violated applicant's rights to due process (paragraphs 15, 19, 21, 23 and 27)

30. By virtue of the foregoing, applicant respectfully submits that he is under no legal obligation to serve and that the USAF has no legal lien on his services and has had none since June 17, 1968; and that since the USAF illegally, unilaterally and without cause breached the reenlistment contract, referred to in paragraph 8 supra, the continued enforcement of said contract constitutes an unlawful detention and restraint of applicant's liberty.

31. Applicant respectfully requests that upon this application this court require the production of the records, papers, affidavits and exhibits constituting the files and records of applicant's case.

32. All administrative remedies have been exhausted and no previous judicial application has been made for the writ herein sought.

33. Applicant is currently temporarily assigned to Arizona State University which is within the jurisdiction of the United States District Court for the District of Arizona; venue, it is therefore submitted, properly is laid in this District.

Wherefore, applicant respectfully prays that this court direct the respondent herein named to not remove the applicant from this court's jurisdiction pending a final determination in this matter, and that a writ of habeas corpus be issued, directing the aforementioned respondent to show cause, if any he have, why applicant should not be released from service and honorably discharged.

/s/ Herbert Phillip Schlanger  
Pro Se  
1019 E. Lemon St.  
Tempe, Az. 85281

All allegations contained in the foregoing application are made on personal knowledge except those contained in paragraphs 9, 10, 13, 25 and 26 which are based on applicant's information and belief.

/s/ Herbert Phillip Schlanger  
HERBERT PHILLIP SCHLANGER

Subscribed and sworn to before me this 27th day of August, A.D. 1969 at Tempe, Arizona.

/s/ [Illegible]  
Notary Public  
My Commission Expires  
Oct. 30, 1971

## EXHIBITS

1. Statement of Major Graham W. Rider; April 8, 1968
- 1A. Notification of withdrawal; June 17, 1968
2. Letter of acknowledgement; June 22, 1968
3. Telegram from applicant; June 30, 1968
4. Letter—reply to (3); July 5, 1968
5. Telegram from applicant; July 12, 1968
6. Reassignment orders; July 10, 1968
7. Telegram to applicant; July 17, 1968
8. AFR 120-3, p. 1
9. Paragraph 2-2, AFIT Student Manual
10. Appeal for hearing (4 pages)
11. Letter—reply to (10); August 27, 1968
12. Application for discharge (5 pages); September 4, 1968
13. Reply to (12); October 29, 1968

## EXHIBIT 1

## STATEMENT OF MAJOR GRAHAM W. RIDER

8 Apr 68

1. Attached to this letter are statements from two officers which report on the conduct of Sergeant Schlanger. Major Eatinger was my predecessor as Liaison Officer, and Captain Miner is, and was on one previous occasion, Chief of a team to which Sergeant Schlanger has been assigned for administrative purposes. At the time I became Liaison Officer (1 Feb 68), Sergeant Schlanger was under medical care following an overdose of drugs taken, presumably unintentionally, during final examination week of the past semester. At that time I assumed, wrongly, that AFIT was taking action to remove the Sergeant from the program.

2. Upon discovering that no such action was being taken, and upon learning that Sergeant Schlanger was again failing to attend classes, I began an investigation. Major Eatinger's statement furnishes you with the requisite background for the case and establishes Sergeant Schlanger's history of failure to attend class. Medical records regarding this case are maintained at Williams AFB and can be made available upon your request to the hospital commander there.

3. Little needs to be added to Captain Miner's report of his investigation. However, I did interview Sergeant Schlanger on 2 April 68. His attitude was hardly that of a loyal, responsible, non-commissioned officer. Further, his appearance was disgraceful. He was wearing a filthy jacket, there was no polish on his shoes, his trousers were long overdue a pressing, and he required a haircut. But it was his mental, rather than his physical condition, which was so out of line with Air Force requirements. This statement is exemplified by his unique distinction of AECP goals. He stated that he felt that the Air Force had sent him here to get a degree; not necessarily to get an education through attending classes and doing his assignments. Though he may be intelligent

enough to accomplish the former without performing the latter, I informed him that our primary goal in the AECP was education and that the degree is considered to be simple evidence of that accomplishment. Before the interview was terminated he admitted that he has been "cutting classes extensively" ever since he has been here. Finally, when I advised him that I would recommend his removal from the program, his only concern was over whether or not AFIT would let him finish this semester. He strikes me as the sort of person who enjoys trying to "beat the system".

4. Approximately ten percent of all AECP students attend ASU. The presence of this man in their midst is damaging to morale, to say the least. Sergeant Schlanger has not shown the required loyalty to duty as a student, and I cannot believe that he would perform differently elsewhere in either a commissioned or a non-commissioned status. I strongly urge you to remove this man from the program immediately.

(signed)

GRAHAM W. RIDER, Major, USAF  
Liaison Officer, ASU

1st Ind

AFROTC Det 25, Arizona State University,  
Tempe, Az. 85281

TO: Commander, AFIT

I am familiar with this case and I concur with the recommendation.

(signed)

ROBERT W. MCFADDEN, Colonel, USAF  
Professor of Aerospace Studies

## EXHIBIT 1A

DEPARTMENT OF THE AIR FORCE  
AIR FORCE INSTITUTE OF TECHNOLOGY (AU)  
WRIGHT-PATTERSON AIR FORCE BASE, OHIO 45433

[DoD Emblem]

REPLY TO

ATTN OF: AFIT-CI

17 June 1968

SUBJECT: Withdrawal from Air Force Institute of  
Technology Program

To: SSgt. Herbert P. Schlanger  
1001 East Lemon Street  
Tempe, Arizona 85281

1. This letter is to inform you that the Commandant of the Air Force Institute of Technology has withdrawn you from the Airman Educational and Commissioning Program for having a lack of officer potential.
2. You are to accomplish the following actions:
  - A. Withdraw from school immediately if you have not already done so.
  - B. Remain at your present resident address pending receipt of transfer orders. Leave or pass will not be authorized, except under emergency conditions, until your orders are published.
  - C. Do not contact Headquarters USAF or any other organization relative to your assignment.
  - D. Acknowledge receipt of this letter and your understanding of its provisions.
  - E. Furnish us one copy of a final education plan and an official transcript as soon as possible.
3. You may expect information about your new assignment within the next two to three weeks. You will be advised of the specific assignment as soon as this information is available to the Air Force Institute of Tech-

nology and PCS orders will be furnished, as promptly as possible.

/s/ Miles R. Palmer  
MILES R. PALMER, Colonel, USAF  
Director, Civilian Institutions Div.

1 Atch  
Blank Ed Plan  
cc: AFIT Liason  
Officer  
PAS

*Strength Through Knowledge*

## EXHIBIT 2

From: SSgt. Herbert P. Schlanger      22 June 1968  
Subject: Letter of Acknowledgement  
To: Colonel Miles R. Palmer  
Director, CID, AFIT  
Wright-Patterson AFB, Ohio 45433

1. I acknowledge receipt of your letter dated 17 June 1968 notifying me of my withdrawal from AECP.
2. I do not understand the following, and require further information:
  - A. What method and what criterion were used in determining my "lack of officer potential"?
  - B. For what reason and under what authority are leave and pass being prohibited?
  - C. Please clarify paragraph 2C of your letter.
  - D. Are there any formal methods of appeal from this decision available to me?
3. Thank you.

HERBERT P. SCHLANGER, SSgt, USAF

EXHIBIT 3

TELEGRAM RECEIVED BY TELEPHONE

TDPF TEMPE

COL MILES R PALMER DIR CIVILIAN INSTITUTIONS DIVN AIR FORCE INSTITUTE OF TECHNOLOGY

SIR I HAVE AS YET RECEIVED NO COMMUNICATION FROM YOU AS WAS REQUESTED IN MY LETTER OF ACKNOWLEDGMENT DATED 22 JUNE 68. SPECIFICALLY REQUESTED IS THE FOLLOWING 1. PLEASE INDICATE WHAT CRITERION WAS USED IN DETERMINING MY QUOTE LACK OF OFFICER POTENTIAL UNQUOTE 2. PLEASE INDICATE FOR WHAT REASON AND UNDER WHAT AUTHORITY LEAVE AND PASS AND BEING PROHIBITED 3. PLEASE CLARIFY PARAGRAPH 2-C OF YOUR LETTER DATED 17 JUNE 68 THANK YOU

Date: C JUNE 30 834PMM

Check: 79 NL PDF 7 EXCFM FURN

Tel. No.: 966-7852

Dest'n.: WRIGHT PATTERSON AFB OHIO

Signature: S/SGT HERBERT P SCHLANGER  
1001 EAST LEMON ST  
TEMPE ARIZ 85281  
CHG. TELE.

Cus: LATCHMEN E—SAME ADS.

## EXHIBIT 4

DEPARTMENT OF THE AIR FORCE  
AIR FORCE INSTITUTE OF TECHNOLOGY (AU)  
WRIGHT-PATTERSON AIR FORCE BASE, OHIO 45433

[DoD Emblem]

REPLY TO

ATTN OF: AFIT-CI

5 July 1968

SUBJECT: Withdrawal From AECP

To: Sgt. Herbert P. Schlanger  
1001 East Lemon Street  
Tempe, Arizona 85281

1. Reference is made to your message of 31 June 1968. Your letter of 22 June 1968 was not received. Your message constitutes acknowledgment of receipt of my letter directing withdrawal.
2. Your withdrawal from the AECP was directed by the Commandant because of a lack of officer potential as demonstrated by your failure to attend scheduled classes.
3. Leave and passes are not authorized because we expect reassignment instructions very soon. Normally, leave would be authorized in connection with travel to your next permanent duty station.
4. Paragraph 2E, my letter 17 June refers to the provisions of paragraph 7-14, Student Manual.

/s/ Franklin D. Blanton,  
FRANKLIN D. BLANTON, Lt. Col., USAF  
Chief, Scientific Education Branch  
Wright-Patterson AFB, Ohio

*Strength Through Knowledge*

## EXHIBIT 5

TELEGRAM RECEIVED BY TELEPHONE  
TDPF TEMPLE ARIZ

COL MILES R PALMER

CT  
527DIRECTOR CIVILIAN INSTITUTIONS DIVISION  
AIRFORCE INSTITUTE OF TECHNOLOGY

1968 JUL 12 PM 8 55

SIR. REGARDING YOUR LETTER OF 5 JULY 68, SEVERAL QUESTIONS REMAIN UNANSWERED. PLEASE INDICATE:

1. MORE SPECIFICALLY, IN WHAT WAY HAVE I DEMONSTRATED A LACK OF OFFICER POTENTIAL? 2. WHAT INVESTIGATION WAS CONDUCTED, WHO CONDUCTED IT, WHO WAS CONTACTED, AND WHAT CONCLUSIONS WERE REACHED IN REGARD TO MY ALLEGED FAILURE TO ATTEND SCHEDULED CLASSES? 3. UNDER WHAT AUTHORITY WAS LEAVE DENIED? 4. PLEASE CLARIFY FURTHER THE REASON FOR WITHHOLDING PASS PRIVILEGES. 5. PLEASE INDICATE UNDER WHAT AUTHORITY THIS ACTION WAS TAKEN. 6. FOR WHAT REASON AND UNDER WHAT AUTHORITY AM I — PROHIBITED FROM CONTACTING ANY ORGANIZATION RELATIVE TO MY ASSIGNMENT? 7. WHAT METHODS OF APPEAL FROM THIS DECISION ARE AVAILABLE TO ME, IF ANY. 8. WILL YOU PLEASE SUPPLY ME WITH PHOTOSTATIC COPIES OF ANY REPORTS, LETTERS OR COMMUNICATIONS RELEVANT TO THIS WITHDRAWAL AND REASSIGNMENT. 9. PLEASE SUPPLY ME WITH PHOTOSTATIC COPIES OF THE REGULATIONS UNDER WHICH I HAVE BEEN WITHDRAWN. 10. PLEASE INDICATE WHAT MY RE-

MAINTAINING SERVICE COMMITMENT IS. THANK  
YOU.

Date: SG JUL 12 705PMST

Check; 169 NL PD F 7X CY FURN

Tel. No.: 966-7852

Dest'n.: WRIGHT PATTERSON AFB OHIO

Signature: STAF SARGEANT  
HERBERT P. SCHLANGER  
1001 EAST XXXX  
LEMON ST TEMPE  
ARIZ 85281

Cus.: EDWARD LATCHMAN  
1001 E LEMON ST  
TEMPE ARIZONA.

## EXHIBIT 6

REPORT OF INDIVIDUAL FOR PERMANENT CHANGE OF STATION - MILITARY			
1. NAME (Last, first, middle initial, AFSC) JOHN J. SANTORO, ROBERT P		2. SHIPPING OFFICE CAFSC A2250	3. <input type="checkbox"/> OVER 4 YRS SERVICE (AFSC only)
4. UNIT, MAJOR COMMAND, AND ADDRESS OF UNIT FROM WHICH ASSIGNED AFWTC INSTITUTE OF TECHNOLOGY (AU) WRIGHT-PATTERSON AFB OH 45433 c/o c/o Air State Univ Wright, OH 45433		5. UNIT, MAJOR COMMAND, AND ADDRESS OF UNIT TO WHICH ASSIGNED 35504th 121st TAG WG (ATC) Hooey AFB, GA 31602	
6. DEPARTURE DATE OFA (PCS without PCA only) 15 Aug 66			
7. REPORT TO COMB, NEW ASSIGNMENT NLT 15 Aug 68	8. DALY Yes	9. LEAVE ADDRESS 1001 E. Lorson Str apt Tampa, FL 33621	
10. PURPOSE OF TDY		11. TDY ENROUTE ADDRESS	
12. NO. OF DAYS	13. TDY REPORTING DATE	14. SECURITY CLEARANCE	
15. INDIVIDUAL ELECTED TO SERVE <input type="checkbox"/> ACCOMPANIED <input type="checkbox"/> UNACCOMPANIED TOUR <input type="checkbox"/> DEPENDENTS PROHIBITED WITHIN GROUND			
16. HOUSE OF DEPENDENTS IS AUTHORIZED TO A DESIGNATED POINT WITHIN ZONE		17. AUTHORITY FOR CONCURRENT TRAVEL	
18. TYPE OF TRANSPORTATION AUTHORIZED FOR CASUALTY TRAVEL WIL <input type="checkbox"/> MIL <input type="checkbox"/> COML ACFT <input type="checkbox"/> NO VESSEL <input type="checkbox"/> VESSEL <input type="checkbox"/>		19. TPC WITHIN 10 DAYS TRAVEL TIME POINT	
20. REPORT TO MAC PASSENGER SERVICE COUNTER AT NEW (Hour and Date) NLT (Hour and Date)			
21. EXCESS BAGGAGE AUTHORIZED POUNDS _____ PIECES _____		22. DISLOCATION ALLOWANCE CATEGORY	
23. DEPENDENTS (List names of dependents and DOW of children)			
24. PCS EXPENSE CHARGEABLE TO			
25. TDY EXPENSE CHARGEABLE TO			
26. CIG		27. AUTHORITY AND PCS CODE AFR 39-11 and Shipment Line Nr 08W0311 PCS Code C	
28. Upon individual's arrival for duty at new duty station, Unit Commander is requested to designate airman to grade of A1C (E-3), with Date of Rank of 1 Feb 65, in accordance with Para 6a, AFR 39-30, as amended.			
29. DATE 20 Jul 66	30. TYPED NAME AND GRADE OF SUPER OFFICIAL JOHN J. SANTORO, 2dLt, USAF	31. SIGNATURE John J. Santoro	32. SPECIAL ORDER NO. A-3173
33. DISTRIBUTION "X"		34. SIGNATURE ELEMENT OF ORDERS AUTHENTICATING OFFICER OFFICIAL JAMES L. PITTS JR, Major, USAF Director of Administrative Services	

## EXHIBIT 7

## WESTERN UNION TELEGRAM

WU025 (L PFA013) GOVT NL PD LUKE AFB ARIZ  
JUL 17 1968

SSGT HERBERT P SCHLANDER  
1001 EAST LEMON ST TEMPE ARIZ  
AFIT CI

SUBJECT: WITHDRAWAL FROM AECP. REFERENCE IS MADE TO YOUR MESSAGE, 13 JULY. THE FOLLOWING RESPONSES CORRESPOND TO YOUR SIMILARLY NUMBERED PARAGRAPHS. 1. YOU DEMONSTRATED A LACK OF OFFICER POTENTIAL BY NOT ATTENDING ALL SCHEDULED CLASSES OF COURSES FOR WHICH YOU WERE REGISTERED AT ARIZ STATE UNIV. 2. AN INQUIRY INTO YOUR CLASS ATTENDANCE WAS CONDUCTED UNDER THE PROVISIONS OF AFR 120-3 AT THE REQUEST OF THIS HEADQUARTERS BY THE PROFEWSOR OF AEROSPACE STUDIES, AFROTC DET 25.

BASED ON THE REPORT OF THAT INQUIRY AND ON LETTERS FROM AFIT OFFICERS AT ASU, THE COMMANDANT CONCLUDED THAT YOUR CLASS ABSENCES DID IN FACT DEMONSTRATE A LACK OF OFFICER POTENTIAL AND DIRECTED YOUR WITHDRAWAL UNDER THE PROVISIONS OF PRA 7A, PG 3 AECP-4 AFM 50-5, JUL 67. 3. THE GRANTING OF LEAVE IS GOVERNED BY AFM 35-22. 4. LEAVE AND POSS PRIVELEGES ARE WITHHELD FROM STUDENTS FOLLOWING WITHDRAWAL FROM AN AFIT PROGRAM TO INSURE THEIR AVAILABILITY FOR IMMEDIATE TRANSFER IN CASE HQ USAF DIRECTS AN EARLY REPORTING DATE

T

TO THE NEW DUTY STATION. 5. SEE PARA 3 ABOVE. 6. THE POINT OF CONTACT ON ASSIGNMENT MATTERS IS THE MEMBERS SERVICING CBPO (AFIT-CBO IN YOUR CASE). PARA 1012, AFM 39-11 PROHIBITS SOLICITING OF ASSIGNMENTS. 7. THERE ARE OMSSTATUTORY PROVISIONS FOR APPEAL OF THE COMMANDANTS DECISION TO WITHDRAW YOU FROM THE AECP. 8. REPORTS, LETTERS AND COMMUNICATIONS PERTAINING TO YOUR WITHDRAWL MERELY FORMED THE BASIS FOR THE COMMANDANTS DECISION. YOU HAVE BEEN ADVISED OF THE DECISION AND OF THE BASIS FOR IT. WE SEE NO REQUIREMENT FOR COPIES TO BE PROVIDED. YOUR REASSIGNMENT WAS EFFECTED UNDER THE PROVISIONS OF AFM 39-11. 9. AIR FORCE REGULATIONS AND MANUALS CITED ABOVE ARE AVAILABLE AT THE AFROTIC DET AND/OR WILLIAMS AFB. 10. PAGE 3 AECP-3, PARA 7.; AFM 50-5 PROVIDES THAT ELMINESS COMPLETED THEIR SIX-YEAR ENLISTMENT

MILES R PALMER, COLONEL, UASF DIRECTOR  
CIVILIAN INSTITUTION DIVISION AFB  
(1050A)

## EXHIBIT 8

\*AFR 120-3

1-3

Air Force Regulation  
No. 120-3

Department of the Air Force  
Washington, 11 October 1954

## INSPECTOR GENERAL ACTIVITIES

*Administrative Inquiries and Investigations**Paragraph*

Purpose and Scope .....	1
Policy .....	2
Definitions .....	3
Authority .....	4
Responsibilities .....	5
Investigative Procedures .....	6
Security Classification .....	7
Rights and Privileges .....	8
Privileged Status .....	9

## 1. Purpose and Scope:

a. This Regulation establishes policy and responsibilities for all administrative inquiries and investigations within the Air Force, except as indicated in b below. It applies to all Air Force activities.

b. When incidents, accidents, or unusual occurrences requiring inquiry or investigation are not specifically or adequately covered by other regulations, this Regulation will apply. It will not govern investigations by the Office of Special Investigations (OSI) or the air police; technical investigations of fires and aircraft accidents; investigations of courts-martial charges; investigations of property survey officers; line of duty investigations; grievances of civilian employees having other appeal rights; and other investigations governed by specific regulations. This Regulation may apply when an investigation required by another regulation discloses facts or information beyond the scope of that particular regulation and indicates the need for further investigation to protect

the best interest of the Air Force, its individuals or organizations.

2. Policy. Matters within the following areas will be properly investigated by an echelon of command compatible with a complete, impartial, and unbiased presentation of facts:

a. Complaints and allegations indicating that rights of individuals or groups of individuals have been transgressed, or that the health, welfare, or efficiency of personnel have been unduly jeopardized. Such matters might include living conditions, working conditions, individual assignments, organizational inefficiency, improper supervision, misconduct, prejudice, and similar matters unless limited by paragraph 1b.

b. Unusual incidents, and occurrences resulting in:

- (1) Loss of life or injury to personnel.
- (2) Considerable loss of or damage to Government property.
- (3) Publicity that might adversely affect Air Force interests and prestige to a serious degree or cause unusual interest in Air Force activities on the part of other governmental agencies, both foreign and domestic. Such incidents or occurrences, which may seriously impair the performance of the assigned mission, might include windstorms, floods, fires, explosions, riots, unusual behavior, serious lack of discipline, and low regard for laws, regulations, and customs, local as well as military.
- (4) Added by 120-3A.

c. Complaints of wrongs submitted by individuals and based on the provisions of Article 138 UCMJ.

3. Definitions. The following definitions apply herein:

a. *Inquiry*.—A determination of the facts of a matter by checking records, reviewing applicable directives, examining material evidence, and interviewing persons having direct knowledge of the facts of a particular matter. Such processes are generally adequate when the subject of inquiry is not complex or of serious consequence and

the matter can be properly resolved through normal staff actions and procedures.

b. *Investigation*—A determination of the facts of a serious or complex matter. An investigation always requires a written report and a written record of the action taken by appropriate authority as a result of the investigation. Investigations normally will be supported by exhibits and sworn testimony of witnesses.

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\* This Regulation supersedes AFR 120-3, 11 April 1951, including Change 120-3A, 10 October 1951.

## EXHIBIT 9

## Chapter 2

## ADMINISTRATIVE

2-1. STATUS OF STUDENTS. Although you are not in a familiar military environment, you must remember that you are a member of the Air Force and will conduct yourself accordingly. Your actions reflect directly on the image of the Air Force. Civilian clothing will be worn for class attendance, but the same standard of neatness as that expected for the military uniform must be maintained. When participating in ceremonial functions, such as commencement exercises, the Class A uniform will be worn unless it conflicts with the established traditions or rules of the college or university. The appropriate uniform will be worn when conducting official business at a military installation or when flying.

2-2. ATTENDANCE AT SCHEDULED CLASSES. Attendance at scheduled classes is the direct counterpart of reporting to duty or to a military formation under normal duty conditions. Each CID student is, therefore, obligated to attend all scheduled classes unless he has been excused from doing so. Permission to be excused must be obtained from a Liaison Officer or from the appropriate AFIT program monitor.

2-3. SIGN OUT RECORDS (PCS, PCA). You must complete AFIT Form 17, "Sign In Record", within 24 hours after completion of official travel, and forward it to AFIT-PD. You will submit AFIT Form 17a, "Sign Out Record", to AFIT-PD upon departing PCS or Permanent Change of Assignment (PCA) from your old duty station (the civilian institution) if you are assigned to a school where there is no AFROTC Detachment. Otherwise, you must sign out at the AFROTC Detachment.

2-4. SIGN IN/OUT REGISTER. AFIT Liaison Officers are responsible for maintaining a sign in/out register for all personnel departing on and returning from TDY. AF Form 1323, "Sign In/Out Register", or a comparable

form, may be used for this purpose. You must notify your Liaison Officer if you are confined to the hospital.

2-5. RECORD OF EMERGENCY DATA. Upon arrival at your duty station, and when a firm address is established, complete and forward a new AF Form 246, "Record of Emergency Data", to AFIT-PD without delay. Thereafter, whenever a change occurs in any item on this form, a new AF Form 246 or 246a will be resubmitted.

2-6. DISPOSITION OF FILED RECORD GROUP. Upon assignment of a student to AFIT, the orders issuing agency is furnished instructions for disposal of the student's records as follows:

a. If the student is rated, the AF Form 5, "Pilot Individual Flight Record", will be hand-carried to the operations officer of the base to which attached for flying proficiency.

b. The Unit Personnel Records Group will be forwarded to AFIT-PD and must arrive on or before the Effective Date of Change of Strength Accountability (EDCSA) stated in the reassignment orders.

c. *Health Record Group.* Disposition will be made in accordance with paragraph 5-1, this manual.

d. *Personal Clothing and Equipment Group.* Personnel on flying status should turn in AF Form 538, "Personal Clothing and Equipment Record", at the base to which attached for flying. Other personnel should retain it in their possession until needed in connection with issuance of personal clothing or equipment. Upon reassignment from AFIT, all students will hand-carry their AF Form 538 to their new duty stations.

e. *Personal Pay Record Group.* Disposition will be made in accordance with paragraph 4-2, this manual.

2-7. TELEPHONE CALLS TO THE AIR FORCE INSTITUTE OF TECHNOLOGY. Except in emergency cases, permission to call AFIT must be obtained from the LO.

## EXHIBIT 10

From: SSgt Herbert P. Schlanger  
1001 East Lemon Street  
Tempe, Arizona 85281

Subject: Request for Hearing and Reconsideration of  
Withdrawal

To: Major General Ernest A. Pinson  
Commandant, AFIT  
Wright-Patterson AFB, Ohio 45433

Dear sir,

The attached summary, originally intended for another purpose, I feel fairly presents the reasons which lead me to believe that I should be granted a hearing. That is the request that I respectfully make, and I hope that, for the good of the Air Force and of myself, you will see fit to grant it. Thank you.

Respectfully yours,

/s/ Herbert P. Schlanger  
HERBERT P. SCHLANGER

On 20 June 1968, I received notice (appendix 1) of the Commandant's decision to withdraw me from the AECP. This action came abruptly, without notice, just two (2) months prior to my scheduled graduation. The reason stated for the withdrawal was that I lacked officer potential. I have been in the program since January 1966, when an education plan forecasting a graduation date of May 1968 was submitted to, and approved by AFIT, and had met all requirements of the program successfully, up to at least March 25, 1968. This fact is substantiated by my continued participation in the program and is further reinforced by the fact that on 25 March 1968, less than three (3) months prior to receipt of the order of 17 June 1968, HQ, USAF and AFIT approved a revised graduation date of August 1968.

This revision was necessitated by an illness during December 1967 and January 1968 which disrupted the pro-

jected course of study. Before this new graduation date was approved I am informed, and believe, that performance in the program, including my officer potential, was reviewed, and not found wanting.

The order of 17 June 1968 raises very serious questions including, but not limited to:

1. Whether paragraph 2B was intended, as it does, to order me into a state of arrest, and if so, on what "probable cause", and
2. Why was I ordered (paragraph 2C) not to "contact HQ, USAF or any other organization relative to (my) assignment".

In attempting to obtain clarification of the order in question, I first wrote to AFIT (appendix 3) and, receiving no reply from that headquarters, sought the aid of legal counsel at Williams Air Force Base. After a period of approximately a week I was informed that that office had determined that they would not render me any legal assistance in this case. After being denied counsel I again requested clarification from AFIT (appendix 4) and was informed that the "lack of officer potential (was) demonstrated by (my) failure to attend scheduled classes." I can categorically assert that between 25 March 1968 and 17 June 1968 my class attendance conformed with the regulations of Arizona State University governing academic performance, and this is reflected in the concern and surprise of the Dean of Students at my withdrawal (appendix 8).

In examining the charge that I failed to attend scheduled classes, the most immediate question, it seems, is how was this alleged misconduct demonstrated to the satisfaction of the Commandant. It could not have been as a reflection of my academic performance, since I am maintaining a satisfactory average and will graduate (now at my own expense) in August, as scheduled. It cannot have been as a result of class attendance records, since none of my professors took roll calls. AFIT implies (appendix 7) that the results of an inquiry into my class attendance substantiate the allegations made by certain officers in the AFIT program at ASU. This in-

quiry is of interest for two reasons. First, Major Halley, the investigating officer, told me, when I inquired two weeks ago, that he had contacted my professors and, for the reason indicated above, the results of his inquiry were "inconclusive".

The second point concerns the authority under which this inquiry was conducted (AFR 120-3). It is contended that my alleged failure to attend classes constitutes a refusal to obey a lawful order—a court-martial offense. AFR 120-3 specifically states that it does not govern the investigation of courts-martial charges. Also, if such an order had been given, and I had refused to obey it, and this refusal had, in fact, been established then the failure on the part of my superiors to promptly prosecute me under the appropriate articles of the UCMJ is itself a violation of the UCMJ. This cannot be the case. Therefore, it seems inevitable that we must conclude that the reasons given for my withdrawal do not stand up under close scrutiny. This fact, and this fact alone, would indicate that I am entitled to a hearing so that the truth or falsity of the allegations can be ascertained.

But the question remains—why was I withdrawn? What was it that convinced my superiors that I lacked officer potential? Only one thing happened this spring that was in any way different from past semesters—my participation in an extra-curricular activity that caused Major Rider, the AFIT liaison officer at ASU, to condemn my actions as "inappropriate", to caution me that I was getting in with "bad groups", and to warn me that my activities might lead to a court-martial. This activity, my participation in the formation, and chairmanship of the ASU Civil Rights Board was what apparently marked me as failing "to measure up to the high standards expected of Air Force officers" (AFM 50-5). This group, accredited to the campus of ASU, engaged in orderly, lawful petition to redress grievances and was effective in helping insure the civil rights of all.

The evidence strongly indicates that it was this activity on my part, not any unsubstantiated "failure to attend scheduled classes", that led to my withdrawal from the AECP. The coincidence in timing of the pub-

licity attendant to our CRB activities (see appendix) and the dates of the approval of my extension (March) and my withdrawal (June), the comments of Major Rider and other officers regarding my participation, the fact that AFR 120-3 *does* cover investigations concerned with "unusual occurrences . . . resulting in publicity that might adversely affect Air Force interests . . .", and the lack of any other demonstratable grounds for such a withdrawal, all point to this conclusion.

I firmly believe that if legal counsel were allowed to participate and advise me, and to make recommendations to my commander, such counsel would find that I had lived up to all prescribed standards, and an investigation would show that during the period in question this activity (civil rights) was the only one which resulted in cautioning of me by my superiors.

I therefore respectfully request that, in the interest of justice and noting the press of time, my case be investigated immediately, that I be provided with legal counsel, and a hearing be conducted to determine the truth and validity of my statements.

## EXHIBIT 11

DEPARTMENT OF THE AIR FORCE  
AIR FORCE INSTITUTE OF TECHNOLOGY (AU)  
WRIGHT-PATTERSON AIR FORCE BASE, OHIO 45433

[DoD Emblem]

REPLY TO

ATTN OF: AFIT-G

27 Aug 1968

SUBJECT: Recommendation for Elimination from the  
AECF, SSgt Herbert P. Schlanger,  
AF12671481

To: A1C Herbert P. Schlanger  
3550th Plt Tng Wg (ATC)  
Moody AFB Ga 31602

1. Your request for hearing and reconsideration of withdrawal from the AECF is denied. Complete review of the evidence presented in your case shows that you were capable of attending classes in the Spring semester 1968, but failed without authority to do so. This failure to attend all scheduled classes followed a series of unexplained, unauthorized absences in preceding terms; absences about which you were counseled by both your professors and your AFIT Liaison Officer. Failure to attend classes without excuse is behavior contrary to that expected of an officer trainee.

2. Your activities with the Arizona State University Civil Rights Board were not considered to be discreditable in arriving at the decision to withdraw you from the AECF. You were withdrawn for lack of officer potential as demonstrated by unexcused absence from classes under the authority vested in me by AFM 50-5. You have not presented any new evidence to either deny or offer a reasonable excuse for your absence from class. No useful purpose would be served by a hearing.

ERNEST A. PINSON, Major General, USAF  
Commandant

*Strength Through Knowledge*

## EXHIBIT 12

From: SSgt Herbert P. Schlanger  
3350 FMS  
Moody AFB, Ga. 31601

Subject: Request for Discharge

To: Commander, Moody AFB, Ga.

Sir:

For the following reasons I request that I be discharged under the provisions of AFM 39-10:

1. I have served honorably in the U.S. Air Force for a period of five (5) years, nine (9) months;

2. On 9 Dec 65 I was re-enlisted for a period of six (6) years in order to enter the Airman's Education and Commissioning Program (AECP);

3. My selection for the AECP followed an extensive evaluation of both my potential and attitude;

4. My withdrawal from the AECP was occasioned, it is asserted, by my "lack of officer potential" and "poor attitude";

5. Both my "officer potential" and attitude were commented on favorably by several recommending officers prior to my entry into the AECP;

6. Therefore it seems logical to conclude that either:

a. The original evaluation of my qualities (i.e., potential, attitude and abilities) was in error, or

b. AFIT erred in its evaluation which led to my withdrawal;

7. If 6(a), then it is felt that I should be discharged in accordance with the provisions of AFM 39-10, para 8, since, through no fault of my own, I was re-enlisted for a program for which I was ineligible;

8. If 6(b), then either:

a. I should be reinstated in the AECP, reimbursed for all expenses incurred in concluding my

bachlor's degree program, any salary lost due to my impending administrative demotion be made up, letters of retraction and correction be sent to those civilians in contacts with whom AFIT has impugned my character, the form 785 currently in my personnel file be suitably revised, and I be permitted to attend OTS, or,

- b. I should be discharged under the provisions of AFM 39-10, para 80.

9. It might be contended that both evaluations were correct, and that my withdrawal was made because of a change of attitude on my part in the interim or an action by me which indicated a "lack of officer potential". This conclusion cannot be substantiated and is, in fact, demonstrably false. On 3 Mar 68 I requested that AFIT approve a revision of my scheduled graduation date (from May 68 to Aug 68) since an illness in Jan 68 had disrupted my course of study. This request was granted on 25 Mar 68. Certainly this extension would not have been approved had I demonstrated a "lack of officer potential" or a poor attitude up to that time. Yet less than ten weeks later I was withdrawn from the AECP for those very reasons. It seems apparent, therefore, that no change in attitude or potential (if, indeed, a person's "officer potential" can change at all) was noted by AFIT in the period from Jan 66 (my entry into the program) through Mar 68 (approval of the extension)—a period of over two years. Yet just eight weeks prior to my scheduled completion of the program I was abruptly ordered to withdraw from school because I "lack officer potential"; no specifics were given at that time and repeated inquiries have resulted only in vague generalities being offered by AFIT, in terms of clarification, leading to reinforcement of my conviction that 6(b) is the correct conclusion to be drawn.

10. This being the case, we are left with 8(a) and 8(b) as alternative solutions, if action with justice and reason is to be taken. It would seem that present circumstances render 8(b) the more preferable of the two.

11. If my request, contained herein, for an honorable discharge or some other favorable administrative action is denied, it is my intention to pursue all other remedies available to me including, but not limited to, litigation in the federal courts.

Submitted on 4 September 1968.

/s/ Herbert P. Schlanger  
HERBERT P. SCHLANGER  
SSgt, USAF

From: A1C Herbert P. Schlanger  
3550 FMS  
Moody AFB, Ga. 31601

Subject: Discharge Application—Additional Information  
To: MPC (AFPMAKE)  
Randolph AFB, Texas 78148

1. I will not attempt, at this time, to demonstrate the falsity of AFIT's charge that I "failed to attend all scheduled classes" since (a) the burden of proof should be assumed by the accusing agency and (b) it is virtually impossible to prove that any student was in any particular class when, as in this case, the professors did not take roll; certainly my circumstances at the present time make this even more difficult. What the following shall attempt to show is the weakness of AFIT's contentions and the arbitrary manner in which this case was handled.

2. I was withdrawn, allegedly, for "having a lack of officer potential."

- a. This argument is weak as was demonstrated in my original letter, and
- b. "Lack of officer potential" was not among the possible reasons for withdrawal from an AFIT program as they were enumerated in the AFIT Student Manual dated 1 June 1967. This phrase was added to the list following my elimination

from the AECF—apparently as an ex post facto justification of my withdrawal (Student Manual, 1 July 1968).

3. Paragraph 2B of Col. Palmer's letter dated 17 June 1968 orders me into a state of arrest (as defined in Art. 9, UCMJ) without probable cause—a violation of Art. 97, UCMJ.

4. Paragraph 2C of that letter has been deemed (by at least two military lawyers) to be an illegal order—After I had inquired three times AFIT attempted to justify the issuance of this order by citing AFM 39-11, para 1012 as the authority; inspection shows, however, that this paragraph does not apply nor does it confer authority to so restrict communication.

5. I was denied legal advice and assistance by JAG at Williams AFB, Az., HQ AFIT at Wright-Patterson AFB, Ohio, and HQ AU at Maxwell AFB, Ala.

6. AFIT contends that “an inquiry into (my) class attendance was conducted under the provisions of AFR 120-3 . . . by the Professor of Aerospace Sciences, AFROTC Det. 25” (at Arizona State University). Ignoring, for the moment, the fact that AFR 120-3 does not cover investigations of this sort, let us briefly examine the regulation. It states that investigations “will be (carried out) by an echelon of command compatible with a complete, impartial and unbiased presentation of facts.” It is difficult, in light of the association of AFIT officers at ASU (including those making the accusations to be investigated) and the officers of the PAS office, to consider the PAS as “at an echelon of command compatible with a complete, impartial and unbiased presentation of facts.” Further, the nature of this case would seem to warrant an “investigation” rather than an “inquiry” (AFR 120-3, para 3). The results of this “inquiry” must also be questioned since, when I asked the investigating officer (after I had been withdrawn) about the results, he said his report had been “inconclusive”.

7. HQ AU (AUG) responded to an inquiry I made through a letter dated 3 Sept 1968 which attempted to justify AFIT's withdrawal action. Paragraph 1a of that letter states that "the report was conclusive" but in no way supports this contention. Perhaps AFIT and I differ in our definitions of "counselling" but I don't recall being "counselled by some of (my) professors." Paragraph 1b simply restates the requirement for attendance. Paragraph 1c refers to "counselling" by various officers. I have been under the impression that at the two 1967 "counselling" (sic) sessions I had satisfactorily explained the absences that had occurred. As for Major Rider's assertion that I admitted to him "that (I) had been cutting classes extensively ever since (I) had been (at Arizona State University)" I can only say that I never made such a statement. I should think that it would be obvious that I would never make such a self-incriminatory statement—even had it been true. Further evidence of the inadequate nature of the "inquiry" is given by the—let us say, at best, exaggerated—assertion that I "failed . . . to attend the majority of the classes in which (I) was enrolled." Paragraph 1d reports that Major Rider felt that I was not officer material. Paragraph 1e contains another false allegation—this one asserting that I was "maintaining a disgraceful personal appearance." All I can say to this is that this charge must never have been looked into, even though it "contributed to (AFIT-CI's) decision to recommend elimination." Given the opportunity I could produce scores of witnesses—including the President of the University, the Dean of Students, members of the faculty, clergymen and civic leaders—to refute this damaging, untrue statement. Paragraph 2 does not exist. Paragraph 3 refers to the aforementioned "inquiry". It makes mention of "records" of Arizona State University from which information concerning my alleged absences was obtained. It fails to specify what particular records—perhaps because no records of class attendance were kept. It should be noted, also, that this inquiry was supposedly concerned with my attendance during the Spring semester, 1968, and—contrary to the implication of paragraph 3—I did not receive three "In-

complete" grades that semester. Those grades of "I" were received in the previous term because I was hospitalized during the week of final exams. This is but one example of the apparent confusion as to the focus of the inquiry. Nowhere in this report is one concrete *fact* mentioned.

8. The recommendations of me by officers prior to my entry into the AECP are in my personnel file at the CBPO, Moody AFB, Ga.

9. Enclosed is a copy of my request for a hearing which was submitted to General Pinson. It contains much of the information presented here, along with several additional points. This request was denied because, according to the Commandant, a hearing would serve "no useful purpose".

10. I shall refrain from elaborating on what I am convinced was the underlying reason for my withdrawal—my participation in an extra-curricular activity which Major Rider found objectionable. Despite AFIT's denials, the evidence still indicated that this was the major factor in the initiation of elimination action.

11. In spite of repeated requests—both oral and written—I have been denied access to the "evidence" presented against me to AFIT. Had I been given an opportunity I am confident that I could have refuted it.

12. If I can be of assistance in the clarification of any aspect of this case please contact me. My duty phone is extension 3836; my mailing address is PO Box 337, Moody AFB, Ga. 31601.

HERBERT P. SCHLANGER  
A1C, USAF

cc: Senator Jacob K. Javits  
Representative William F. Ryan  
Dr. John Morris

## EXHIBIT 13

DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS UNITED STATES AIR FORCE  
WASHINGTON, D.C.

29 Oct. 1968

REPLY TO USAFMPC (AFPMAKE)

ATTN OF: RANDOLPH AFB TEXAS 78148

SUBJECT: A1C Herbert P. Schlanger, AF 12 671 481

To: Tech Tng Cen (CBPO-SA)  
Keesler AFB, Miss 39534

Not favorably considered for the following reasons:

a. After careful review of the entire case file, it is our considered opinion that Airman Schlanger was properly eliminated from the AECP.

b. Since Airman Schlanger received over two years of college education, at essentially no expense to himself, while drawing pay and allowances from the Air Force, the Air Force is entitled to expect him to comply with his December 1965 enlistment contract.

c. This application cannot be considered as a petition for a new forum before which he may contest the propriety of his involuntary withdrawal from AECP. This issue has already been contested, decided, appealed, and sustained by Air University.

FOR THE CHIEF OF STAFF

/s/ Dale T. Sarrett

DALE T. SARRETT

Lt Colonel, USAF

Directorate of Pers

Program Actions

2 Atch

1. AF Fm 107 w/2 Atch

2. Ltr fr Amn Schlanger,  
undated, w/Atchs

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

No. Civ. 69-381 Phx.

[File Endorsement Omitted]

[Title Omitted]

ORDER—August 28, 1969

The petition of Herbert Phillip Schlanger for writ of habeas corpus having been submitted and the Court having duly considered the same,

IT IS ORDERED that the petition of Herbert Phillip Schlanger for writ of habeas corpus is denied. *Saunders v. Crouchley*, 274 F.Supp. 505 (1967).

DATED August 28, 1969.

WM. P. COPPLE  
United States District Judge

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 24826

[File Endorsement Omitted]

HERBERT PHILLIP SCHLANGER, APPELLANT

*v.*

HON. DR. ROBERT C. SEAMANS, JR., Secretary of the Air Force, COLONEL HOMER BAKER, Commander, Moody AFB, Valdosta, Georgia, and COLONEL NOEL B. REDDRICK, Commander AFROTC Det. 15, Arizona State University, Tempe, Arizona, APPELLEES

ORDER—Filed December 12, 1969

Before: HAMLEY, BROWNING and CARTER, Circuit Judges

The order denying the application for a writ of habeas corpus is set aside without prejudice and the cause is remanded to the district court for issuance of an order to show cause and further proceedings thereon.

FREDERICK G. HAMLEY  
JAMES R. BROWNING  
JAMES M. CARTER  
United States Circuit Judges

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

No. Civ. 69-381 Phx.

HERBERT PHILLIP SCHLANGER, PETITIONER

*vs.*

DR. ROBERT C. SEAMANS, JR., Secretary of the Air Force,  
COLONEL HOMER BAKER, Commander, Moody AFB,  
Valdosta, Georgia, and COLONEL NOEL B. REDDRICK,  
Commander, AFROTC Det 25, Arizona State Univer-  
sity, Tempe, Arizona, RESPONDENTS

ORDER—January 8, 1970

Petitioner having submitted herein an application for writ of habeas corpus, and good cause appearing therefrom,

IT IS ORDERED that the respondents above named shall, within twenty (20) days from the date hereof, show cause, if any they have, why the application for writ of habeas corpus should not be granted, or why a hearing should not be held on the merits of said application, by filing with this Court such response as you deem appropriate.

IT IS FURTHER ORDERED that a copy of the verified application for writ of habeas corpus, along with a copy of this order, be served upon each of the respondents and the United States Attorney for the District of Arizona by the United States Marshal.

DATED January 8, 1970.

WM. P. COPPLE  
United States District Judge

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 24,826

[Filed Jan. 7, 1970, Wm. B. Luck, Clerk]

HERBERT PHILLIP SCHLANGER, APPELLANT

*v.*

HON. DR. ROBERT C. SEAMANS, JR.,  
Secretary of the Air Force, ET AL., APPELLEES

CORRECTED ORDER

Appellees are stayed from removing appellant, or ordering or causing his removal, from the District of Arizona until proceedings in the district court pursuant to this court's mandate are completed, or until the further order of the district court.

JAMES R. BROWNING  
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

No. CIV-69-381-PHX-WPC

HERBERT PHILLIP SCHLANGER, PETITIONER

vs.

DR. ROBERT C. SEAMANS, JR., ET AL., RESPONDENTS

MOTION TO DISMISS—Filed January 27, 1970

COMES NOW the respondents in the above captioned matter, appearing specially by Richard C. Gormley, Assistant United States Attorney, in response to Order to Show Cause issued by this Court on January 8, 1970, and respectfully moves this Court to dismiss the petition for habeas corpus heretofore filed on the grounds that this Court lacks jurisdiction.

DATED this 27th day of January, 1970.

RICHARD K. BURKE  
United States Attorney

RICHARD C. GORMLEY  
Assistant U. S. Attorney

MEMORANDUM OF LAW

It is well settled law that this Court should and must find that jurisdiction exists first before entertaining any proceeding. *Bookout v. Beck*, 354 F.2d 823 (C.A. 9 1965).

An indispensable party in any habeas corpus proceeding involving a serviceman is the Commander who has custody of the petitioner. The petitioner, in Paragraph 4 of his application for a writ of habeas corpus, alleges

that the Honorable Robert Seamans, Jr., Secretary of the Air Force, and Colonel Homer Baker, Commander of Moody Air Force Base, Georgia, are the persons who are at present unlawfully restraining him of his liberty. As can be seen by the return of the United States Marshal, neither of these persons were found within the confines of the State of Arizona which comprises the geographical jurisdiction of this Court.

At the time the petition was filed in this district, the petitioner was on leave status from the 3550th Air Base Group, Moody Air Force Base, Georgia. Attached to this motion is an affidavit to that effect executed by the personnel records custodian of the aforementioned base.

It has long been established that the jurisdiction of a United States District Court to issue a writ of habeas corpus is limited to those cases in which the petitioner is confined or detained within the territorial jurisdiction of the Court. *Ahrens v. Clark*, 335 U.S. 188 (1948); *Duncan v. State of Maine*, 295 F.2d 528 (C.A. 1 1961) *cert. denied* 368 U.S. 998. It is likewise beyond argument that a person on active duty in the armed services may be "in custody" within the meaning of 28 U.S.C. § 2241. *Brown v. McNamara*, 387 F.2d 150 (C.A. 3 1967) *cert. denied sub nom*; *Brown v. Clifford*, 390 U.S. 1005 (1968).

In the instant case Sergeant Schlanger was and is on leave status from his Commander at Moody Air Force Base, Georgia. It is therefore essential that any action concerning his alleged detention be brought in the United States District Court in the State of Georgia. *Wurster v. Perrin*, 303 F.Supp. 480 (1969); *Rudick v. Laird*, 412 F.2d 16 (C.A. 2 1969), *cert. denied* 38 L.W. 3174.

Attached hereto is a copy of the decision of the United States District Court for the District of Massachusetts in the case of McKay v. Secretary of the United States Air Force, Misc. No. 69-80-W. Also attached hereto is a copy of the decision of the United States Court of Appeals for the District of Columbia in the same matter.

Based upon the foregoing, it is respectfully submitted that the petition should be dismissed for want of jurisdiction over the person.

RICHARD K. BURKE  
United States Attorney

RICHARD C. GORMLEY  
Assistant U. S. Attorney

Copy of the foregoing mailed this  
27th day of January, 1970, to:

Sgt. Herbert P. Schlanger  
2419 North Saratoga  
Tempe, Arizona 85281

Captain Titsworth  
Office of the Judge Advocate General  
Williams Air Force Base, Arizona 85027

RICHARD C. GORMLEY  
Assistant U. S. Attorney

STATE OF GEORGIA            )  
  ) AFFIDAVIT  
COUNTY OF LOWNDES        )

Before me, BETTY R. LANGLEY, a Notary Public in and for said County, personally came LAWRENCE D. McDONALD, 1stLt, USAF, 328-38-7351 FV, Chief, Data Control Section and the official personnel records custodian of the military records of Sgt Herbert P. Schlanger, FR 027-32-5213, 3550th Air Base Group, Moody Air Force Base, Georgia, who, being duly sworn according to law, deposes and says that the official military personnel records of Sgt Herbert P. Schlanger, FR 027-32-5213, reflect his duty status from 4 June 1969 to 21 September 1969 as follows:

FROM:	THRU:	STATUS:	REMARKS:
4 Jun 69*	14 Jun 69	Leave	11 days leave
15 Jun 69	15 Jun 69	TDY	1 day travel as authorized by AFM 213-1
16 Jun 69	22 Aug 69	TDY	Attending school—68 days
23 Aug 69	19 Sep 69	Leave	28 days leave
20 Sep 69	20 Sep 69	TDY	1 day travel as authorized by AFM 213-1
21 Sep 69**	N/A	Present for Duty	Returned to Moody AFB

\* Date signed out

\*\* Date signed in

The above 39 days of leave were taken in conjunction with permissive TDY for the purpose of attending college at Arizona State University. The two days of travel shown above were computed in accordance with Table 5, AFM 35-6. Sgt Schlanger was authorized 70 days TDY, including two days of travel time based on available air travel (Paragraph 4-5d, AFM 213-1).

Further, Sgt Schlanger is presently in a leave status which commenced on 9 December 1969.

/s/ Lawrence D. McDonald  
 LAWRENCE D. McDONALD  
 1stLt, USAF  
 328-38-7351 FV  
 Chief, Data Control Section  
 3550 Air Base Gp, Moody AFB, Ga.

SWORN TO before me and subscribed in my presence this 16 day of January, 1970.

/s/ Betty R. Langley  
 Notary Public  
 Georgia, State-At-Large  
 My Commission Expires May 7, 1973

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

No. CIV 69-381 PHX WPC

HERBERT PHILLIP SCHLANGER, PETITIONER

*vs*

DR. ROBERT C. SEAMANS, JR., ET AL., RESPONDENTS

SUPPLEMENTAL MEMORANDUM—Filed January 30, 1970

On January 27, 1970, the Respondents appearing specially in the above captioned matter filed a Motion to Dismiss. Attached thereto were certain exhibits. In further support of the Motion to Dismiss, the Respondents attach hereto a duly authenticated certification by Robert C. Seamans, Jr., Secretary of the Air Force, regarding copies of extracts from the master personnel records of Sgt Herbert P. Schlanger, 027-32-5213, the Petitioner herein.

DATED this 30th day of January, 1970.

RICHARD K. BURKE  
United States Attorney

RICHARD C. GORMLEY  
Assistant U. S. Attorney

Copy of the foregoing mailed  
this 30 day of January, 1970

To: Sgt. Herbert P. Schlanger  
2419 N. Saratoga, Tempe, Arizona 85281

Captain Titsworth  
Office of the Judge Advocate General  
Williams Air Force Base, Arizona 85027

---

RICHARD C. GORMLEY  
Asst. U. S. Attorney

United States



of America

## DEPARTMENT OF THE AIR FORCE

HQ USAF, Washington, D.C. 20 January 1970

HEREBY CERTIFY that I am the Director of Administration, Department of the Air Force, and as such am the official custodian of all Air Force Records. I further certify that the attached is a true and exact copy of extracts from the Master Personnel Records of Sgt Herbert P. Schlanger, 027-32-5213.

*John F. Rash*  
 JOHN F. RASH  
 Colonel, USAF  
 Director of Administration  
 United States Air Force

I HEREBY CERTIFY that Colonel John F. Rash, USAF, who  
 issued the foregoing certificate, is the Director of Administration, United States Air Force,  
 and  
 that his certification as such, full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF, ROBERT C. SEAVANS, JR.,

Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the city of Washington.

this 21st day of January 1970

By *[Signature]* Secretary of the Air Force.

## 1. AUTHORIZATION FOR CHANGE OF AD

## \* NATIVE ORDERS

(If more space is required, continue on reverse, identifying pages by number)

FROM:

CAS

2. ACTION PERTAINING TO THE INDIVIDUAL(S) LISTED IN ITEM 3 AND

☐ REVERSE☐ REVERSE☒ AMENDED AS SHOWN IN ITEM 4

3. IDENTIFICATION OF ORDER BEING CHANGED (Issued by this Headquarters unless otherwise stated in item 3.)

A. PARA. B. ORDER (Type and No.) C. DATE

D. TED

☐ PCS \* PCA☐ PCS \* OPCA

E. RELATING TO (TDY, PCS, Short Tour of AD, etc.)

TA-124

28 May 1969

Permissive TDY - To Arizona State University, Tempe, AZ for approximately 70 days. Purpose - to attend Education Bootcamp

4. PREVIOUS AMENDMENTS ISSUED BY THIS HEADQUARTERS

A. PARA. B. ORDER (Type and No.) C. DATE

5. IDENTIFICATION OF INDIVIDUAL(S) TO WHOM CHANGE ACTION PERTAINS

A. GRADE B. LAST NAME, FIRST, MIDDLE, INITIAL

SGT SCHLANGER, HERBERT P.

C. ARSNO OR POSITION TITLE (Civilian) D. ORGANIZATION

027-32-5213

3550th FASg

6. AMENDMENT (Identify item in order being amended)

A. ITEM B. AS READ

C. AMENDED TO READ

15 days leave

15 days leave

7. ITEM C. AMENDED TO INCLUDE

8. REMARKS

9. DATE 10. APPROVING OFFICIAL (Typed name, grade and title)

15 Sep 69 11. SIGNATURE 12. PHONE NO.

13. ADDRESS AND LOCATION OF HEADQUARTERS

DEPARTMENT OF THE AIR FORCE  
ON 3550th FASg TRAINING WING (AFM)  
MOODY AIR FORCE BASE, GEORGIA 31601

14. DISTRIBUTION

15. SIGNATURE

16. SIGNATURE

17. ORDER (Type and No.)

TA-791

15 Sep 69

18. SIGNATURE

FOR THE COMMANDER

19. SIGNATURE 20. AUTHENTICATING OFFICIAL



CAPTAIN, USAF

OFFICIAL DISTRIBUTION

CONFIDENTIAL  
 SECURITY OF THE AIR FORCE  
 HEADQUARTERS 3550th AFHQ, WASHINGTON, D.C. (100)  
 MOODY AIR FORCE BASE, GEORGIA 31602

28 May 1969

CONFIDENTIAL  
 SECURITY

TO: SAC, WASHINGTON, D.C., AF267423, SSM: 027-34-523, 3550th AFHQ  
 FROM: SAC, WASHINGTON, D.C., AF267423, SSM: 027-34-523, 3550th AFHQ  
 SUBJECT: Security of the Air Force, AFHQ, effective on or about 4 June 1969 for approximately  
 30 days for the purpose of attending the University of the South Atlantic (USA) in  
 Virginia and return to Moody AFB, Ga. Travel authorized by this order is at the  
 expense of the Government and does not include travel to expenses of travel.  
 Personnel is authorized 15 days leave, leave address: 2419 N. Garretts, Tampa, Fla.  
 33614. Personnel will contact the Education Services Office prior to departure on  
 leave to ensure compliance with paragraph 4-37, AFM 21-3-1. Personnel is authorized  
 and shall maintain duty station. SSS - 0232. AUTHORITY: AFM 39-2, AFM 21-3-1,  
 AFM 21-3-2 (AFHQ-1).

CLAUDE S. PETER, Colonel, USAF  
 Commander

DISSEMINATION  
 "A"

CONFIDENTIAL, USAF  
 Registration





[illegible]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Civ 69-381 Phx

HERBERT PHILLIP SCHLANGER, APPLICANT

v.

Hon. DR. ROBERT C. SEAMANS, JR., Secretary of the Air  
Force, ET AL., RESPONDENTS

MOTION—February 2, 1970

HERBERT PHILLIP SCHLANGER, pro se in forma pauperis, respectfully moves this court to dismiss respondents' motion of January 27, 1970 for the following reasons, which are more elaborately set forth in the accompanying memorandum:

1. An attack on this court's jurisdiction is precluded by previous decisions in this case;

2. This court, as a matter of law and of fact, is the proper forum in which this controversy should be heard.

Alternatively, the annexed memorandum is submitted in opposition to respondents' aforementioned motion and applicant, then, requests that oral argument be heard at the earliest possible time but in no case later than February 9, 1970.

Applicant further moves this court, should it sustain respondents' aforementioned motion, to continue in effect, for a period of at least one week following said decision, the injunction entered on January 6, 1970 in order to afford applicant an opportunity to seek appropriate relief from the Court of Appeals.

/s/

HERBERT PHILLIP SCHLANGER,  
Pro Se  
P.O. Box 276  
Tempe, Az. 85281

Dated: February 2, 1970  
Tempe, Arizona

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Civ 69-381 Phx

HERBERT PHILLIP SCHLANGER, APPLICANT

v.

Hon. DR. ROBERT C. SEAMANS, JR., Secretary of the Air  
Force, ET AL., RESPONDENTS

MEMORANDUM OF LAW—February 3, 1970

I. AN ATTACK ON THIS COURT'S JURISDICTION  
IS PRECLUDED AT THIS TIME.

Respondent is precluded from attacking the jurisdiction of this court in the instant matter by the theory of the "law of the case", 21 C.J.S. 195, et seq. This court, in dismissing the application for the second time, said:

"... it appears, from the moving papers, that the (applicant) is in the custody and under the orders of the commander of the Moody Air Force Base in Georgia, even though he may be in this area, and I feel that jurisdiction for the matter is in (that) district. . . .",

thus raising the jurisdictional issue on its own motion.

In his brief in support of his appeal (Ninth Circuit, Number 24,826), applicant quoted the court's aforementioned remarks (p. 13) and noted that jurisdiction was question. As respondent points out in his memorandum (p. 1), and as this court has demonstrated by its action, a court must in the first instance, in any proceeding, determine that jurisdiction exists, *Bookout v. Beck*, 354 F.2d 823 (9 Cir, 1965). The Court of Appeals, having the issue squarely before it, did just that; by considering applicant's argument and remanding "for issuance of a show cause order and further proceedings" and then, subsequently, entering an extraordinary order maintaining petitioner's presence in this district, that Court has

decided this issue in petitioner's favor. Right or wrong, it is that decision which has become the law of this case. Further, a ruling of the Court of Appeals cannot be later attacked in a lower court when, as here, there is an absence of any change in the circumstances of the case.

## II. THIS COURT IS, AS A MATTER OF FACT AND LAW, THE PROPER FORUM FOR THIS ACTION.

Respondent appends to his memorandum, without elaboration, a copy of Judge Wyzanski's opinion in *McKay v. Sec'y of the Air Force*, (D. Mass., 1969). Except insofar as the opinion indicates that this court is, indeed, the proper forum for this action, the case cited bears little application to the one at bar. First it was pointed out that, at the time of filing, no custody was being exercised. While this holding is not undisputed by analagous cases, e.g., *Ex parte Fabiani*, 105 *F. Supp.* 139, 148 (E.D. Pa., 1952), custody in the instant case is clear. Applicant herein was undisputedly subject to respondents' orders; that alone is sufficient custody, *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). We need not discuss the alternative mentioned by Judge Wyzanski—the possibility of applicant being AWOL and, hence, not in custody—since respondents' return concedes that such was not the case here. Finally it was held, in *McKay*, that the Massachusetts district court was not the proper forum for the action since, prior to the filing of the petition, McKay had had no contact with that district. This fact was central to the decision. In the instant case petitioner's contact with this district has been more than ample—it has been oevrwhelming; indeed, "lack of contact" could have been convincingly advanced as a defense against this action had it been brought in *any other* district in the United States.

Petitioner was assigned to within this district in January, 1966, pursuant to the terms and conditions of his re-enlistment contract of December 9, 1965, for entrance into the Airman's Education and Commissioning Program (AECPP) at Arizona State University. He was still assigned here when, in May, 1968 an unlawful inquiry into his conduct was allegedly conducted by military authorities at ASU, and when in June, 1968—in an ac-

tion based on this and other unlawful acts—he was unlawfully removed from the AECP. He was re-assigned to ASU on temporary duty (TDY) in June, 1969 to complete, at his own expense, his college education. While petitioner concedes that his status was that of “delay en route”, or “leave”, on the day that the instant application was filed with this court, it was leave in conjunction with the aforementioned TDY assignment, was authorized in the orders originally promulgated regarding the assignment and in no way affects this court’s jurisdiction. At all times petitioner was subject to respondents’ orders; he was sufficiently restrained for habeas corpus to lieu and he was still at the place of his assignment.

On the issue raised by respondents’ motion, the opinion in *U.S. v. Flint*, 54 F. Supp. 889, appended hereto, and affirmed by the Second Circuit, 142 F.2d 62, is more to the point. Applicant therein was inducted, transferred to the Enlisted Reserve and sent home for two weeks furlough before reporting for active duty. It was during those two weeks—while he was free to go where and do what he pleased—that he applied for habeas corpus. Respondent’s motion to dismiss, similar to the instant motion, was denied on the grounds that the petitioner—even though on leave—was sufficiently restrained.

In any event, *Ahrens v. Clark*, 335 U.S. 188 (1948), cited by respondents, was specifically cited by applicant in his appeal brief, in support of his position that jurisdiction was properly laid in this court—a position that was sustained by the subsequent actions of the Court of Appeals. In fact, the Supreme Court’s holding in *Ahrens* left petitioner no choice but to file his petition in this court.

For all of the foregoing reasons, it is submitted that respondents’ motion to dismiss for lack of jurisdiction over the person of the applicant should be denied.

/s/

HERBERT PHILLIP SCHLANGER,  
Pro Se  
P.O. Box 276  
Tempe, Az. 85281

Dated: February 3, 1970  
Tempe, Arizona

## AFFIDAVIT

I, HERBERT PHILLIP SCHLANGER, attest to the following:

1. That in the spring of 1969 I applied for and was granted entrance into "Operation Bootstrap"—an Air Force program which allows a qualified applicant to be assigned in a TDY status to a university or college in order to complete, entirely at his own expense, his degree program. I further requested, and was granted, fifteen (15) days delay enroute in conjunction with this TDY assignment. The restraints imposed upon me during both the period referred to as TDY and that of "delay en route" were, for all practical purposes, the same.

2. I do not contest that August 27, 1969—the day that my application for a writ of habeas corpus was filed—was a day chargeable to me as leave; it was, however, leave authorized in conjunction with the TDY and authorized in those TDY orders. Moreover, it fell between two periods credited as TDY.

3. While not material to the instant issue, I contest the statement of Lt. McDonald, in his affidavit annexed to respondents' motion, that I am currently on leave. I believe that the period from January 6, 1970 is not chargeable as leave, since I am present in Arizona pursuant to an order of the Court of Appeals. Further, I believe that respondents acted wrongly and unlawfully in changing my status, with respect to my entitlement to pay and allowances, on January 18, 1970.

4. I believe that, as a matter of fact and of law, this court is the proper forum for the hearing of this controversy. If the court is troubled by the technical distinction between my status when on TDY and when in delay en route, I request that a hearing be held at which time expert testimony on this and related points would be taken.

5. The Ninth Circuit Court of Appeals was made aware, by me, of the issues raised by respondents' motion and, I believe, took them into consideration before entering its orders of December 12, 1969 and January 6, 1970.

6. I was at all relevant times, and am presently, physically present within the District of Arizona.

/s/ Herbert Phillip Schlanger  
HERBERT PHILLIP SCHLANGER

Sworn and subscribed to before me this fourth day of February, 1970 at Tempe, Arizona.

/s/ Olivia H. Birchett  
Notary Public  
My Commission Expires Jan.  
23, 1972  
OLIVIA H. BIRCHETT

Form USM-643  
(Rev. 4-15-67)

## RETURN ON SERVICE OF WRIT

RECEIVED

United States of America

JAN 30 1970

DISTRICT OF ARIZONA

UNITED STATES NATIONAL

MACON, GA.

10520

Herbert Phillip Schlanger

Clerk's No. Civ. 69-38 Phx

VS.

Dr. Robert C. Seamans, Jr., Sec. of the Air Force

Colonel Homer Baker, Comm. Moody AFB, Valdosta, U.S. Marshal's No. 1141-P

Colonel Noel H. Reddick, Comm. AFROTC Det. 25 Arizona State University  
Tempe, Arizona.

## SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~have~~ served the annexed Order & Application  
on the therein-named Colonel Homer Baker, Comm. Moody AFB  
(Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was  
done in endeavoring to serve) Colonel Homer Baker  
(Name of individual or agent of company, corporation, etc.)

personally at (if endeavor—show addresses where endeavors made)

Six Office, Moody AFB, V

(Address—Street number, apartment number, rural route, etc.)

Valdosta, Georgia

(City)

(State)

in the said District

at 3:30 ~~a.m.~~ p.m., on the 15 day of Jan., 1970.

## SERVICE NOT COMPLETED

Date

I hereby certify and return, that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_,

I received the within \_\_\_\_\_ and that after  
diligent search, I am unable to find the within named \_\_\_\_\_

within said district.

Marshal's fees 3.00Mileage 2.607.60

William V. Martin Jr.

United States Marshal

By

Alfred S. Pitzing

Dep. U.S. Marshal

103

Form U.S. 204  
(Rev. 1-12-25)

## RETURN ON SERVICE OF WRIT

United States of America

DISTRICT OF ARIZONAHerbert Phillip LeidenClerk's No. Civ. 4-1-1-100

vs.

Dr. Robert C. Semmes Jr. et alU.S. Marshal's No. 1141-B

## SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ <sup>served</sup> the annexed writ <sup>(Writ)</sup>  
 on the therein-named Dr. Robert C. Semmes Jr.  
 (Name of individual, company, corporation, etc.)

~~According to and leaving~~ <sup>According to and leaving</sup> a true and correct copy thereof with (if endeavor—describe what was  
 done in endeavoring to serve) a copy of application attached to Dr. Robert C.  
Semmes Jr. by certified mail receipt 115,711 to Phoenix, AZ  
 personally at (if endeavor—show addresses where endeavors made)

Phoenix, Arizona (Address—Street number, apartment number, rural route, etc.)  
 in the said District  
at 1:30 p.m. on the 12th day of January, 1933

## SERVICE NOT COMPLETED

Date \_\_\_\_\_

I hereby certify and return, that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_,  
 I received the within \_\_\_\_\_ and that after  
 diligent search, I am unable to find the within named \_\_\_\_\_  
 within said district.

Marshal's fees 3.00  
 Mileage XX  
 Total 3.00

By [Signature] United States Marshal  
[Signature] Deputy  
 U.S. Marshal

GPO 16-528-013

104

Form USM-220  
(Rev. 4-15-47)

## RETURN ON SERVICE OF WRIT

United States of America

DISTRICT OF ARIZONA

Herbert Phillip Sealsinger

Clerk's No. Civ. 67-361-PHX.

vs.

Dr. Robert C. Seamans Jr. et al

U.S. Marshal's No. 1141-P

## SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~was unable to serve~~ <sup>was unable to serve</sup> the annexed Order  
served (Writ)  
 on the therein-named Colonel Noel F. Reddick  
(Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was  
 done in endeavoring to serve) a copy of application attached with  
(Name of individual or agent of company, corporation, etc.)  
Colonel Noel F. Reddick

personally at (if endeavor—show addresses where endeavors made) Room 302 A

Air Force H.Q.T.C. Bldg. Arizona State University  
(Address—street number, apartment number, rural route, etc.)

Tempe, Arizona  
(City)

in the said District

at 1:30 Am.-p.m., on the 16th day of January, 1972.

## SERVICE NOT COMPLETED

Date

I hereby certify and return, that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_,

I received the within \_\_\_\_\_ and that after  
 diligent search, I am unable to find the within named \_\_\_\_\_

within said district.

Marshal's fees 3.00

Mileage 2.40

Total - - - - \$ 5.40

J. Pat Madrid

United States Marshal.

By Ernest C. Tautner

Ernest C. Tautner

Deputy.

(U.S. 181-C-280-903)

105

Form URM-202  
(Rev. 4-15-67)

## RETURN ON SERVICE OF WRIT

United States of America

DISTRICT OF ARIZONA

Herbert Phillip Schneider

Clerk's No. Civ. 95-311-Ex.

vs.

Dr. Robert C. Jenkins Jr. et al.

U.S. Marshal's No. 1141-P

## SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed ~~Order~~ <sup>Writ</sup>  
 on the therein-named United States Attorney  
(Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was  
 done in endeavoring to serve) with a copy of application attached with Richard  
(Name of individual or agent of company, corporation, etc.)  
Cornley, Assistant U.S. Attorney

personally at (if endeavor—show addresses where endeavors made) Room 5000 Pol. Bldg.

Phoenix, Arizona (Address—Street number, apartment number, rural route, etc.) in the said District  
(City) (State)  
 at 1:15 PM-p.m., on the 11th day of January, 19 72

## SERVICE NOT COMPLETED

Date

I hereby certify and return, that on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_,  
 I received the within \_\_\_\_\_ and that after  
 diligent search, I am unable to find the within named \_\_\_\_\_  
 within said district.

Marshal's fees 3.00

Mileage XX

Total - - - - 3.00

J. Pat. Trial

By James A. Schlecht <sup>United States Marshal</sup>  
 Deputy.

GPO 1967-O-280-903

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

No. Civ. 69-381 Phx.

HERBERT PHILLIP SCHLANGER, PETITIONER

*vs.*

Hon. DR. ROBERT C. SEAMANS, JR., Secretary of the Air Force, COLONEL HOMER BAKER, Commander, Moody AFB, Valdosta, Georgia, and COLONEL NOEL B. REDDRICK, Commander, AFROTC Det 25, Arizona State University, Tempe, Arizona, RESPONDENTS

ORDER—February 10, 1970

Petitioner filed a petition for a writ of habeas corpus alleging that he was being unlawfully detained in the Air Force. The Court, *sua sponte*, denied the petition and petitioner appealed. The United States Court of Appeals for the Ninth Circuit ruled that "The order denying the application for a writ of habeas corpus is set aside without prejudice and the cause is remanded to the district court for issuance of an order to show cause and further proceedings thereon." Pursuant to the Ninth Circuit's order, this Court issued an order to show cause. Respondents have moved to dismiss the petition for lack of jurisdiction, petitioner has opposed said motion, and both sides have filed memoranda setting forth their respective positions. In addition, petitioner has moved this Court, should it grant respondents' motion, to continue to effect the injunction prohibiting petitioner's removal from the District of Arizona so that petitioner may have an opportunity to appeal.

When the petition was filed, petitioner was on leave status from Moody Air Force Base, Georgia. The petition names the Honorable Robert Seamans, Jr., Secretary of the Air Force, and Colonel Homer Baker, Commander of Moody Air Force Base, as those persons unlawfully restraining the petitioner. Neither can be found within the confines of the District of Arizona.

Title 28, § 2243, provides that "The writ . . . shall be directed to the person having custody of the person detained." Under this statute, the appropriate respondent is the person having immediate custody of the petitioner and the capability of discharging him from custody should the Court grant the relief sought. The proper respondent "must be within the territorial jurisdiction of the Court . . . [A] court does not have power to issue a writ [of habeas corpus] unless the person is within reach of the court's process." *Wurster v. Perrin*, 303 F. Supp. 480 (D.P.R. 1969). See *Ahrens v. Clark*, 335 U.S. 188, 68 S. Ct. 1443 (1948); *Ex Parte Mitsuye Endo*, 323 U.S. 283, 65 S.Ct. 208 (1944); *United States ex rel. Rudick v. Laird*, 412 F.2d 16 (2d Cir. 1969), *cert. denied*, 38 U.S.L.W. 3174 (Nov. 11, 1969); *United States v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 952, 75 S.Ct. 440 (1955); *Jones v. Biddle*, 131 F.2d 853 (8th Cir. 1942), *cert. denied*, 318 U.S. 784, 63 S.Ct. 856 (1943); *United States v. New York State Division of Parole*, 239 F. Supp. 662 (S.D.N.Y. 1965).

When a petitioner is detained by the military, the proper respondent is usually his commanding officer. E.g., *Wurster v. Perrin*, *supra*; see R Sokol, *Federal Habeas Corpus* 82 (2d ed. 1969). And even assuming that the Secretary of petitioner's branch of service may be an appropriate respondent, it is clear that when neither the Secretary nor the commanding officer is within the territorial jurisdiction of the District Court or within reach of the Court's process, the Court lacks jurisdiction. *United States ex rel. Rudick v. Laird*, *supra*; *Wurster v. Perrin*, *supra*.

Here, neither the Secretary of the Air Force nor petitioner's commanding officer is within the territorial jurisdiction of this Court or within reach of this Court's process. Thus, it is apparent from the foregoing authorities that this Court lacks jurisdiction.

Petitioner asserts, however, that since the Ninth Circuit Court of Appeals considered his petition and remanded the case, it is now the "law of the case" that this Court has jurisdiction. But petitioner apparently fails to recognize that this Court's prior order was set aside

*without prejudice* to the rights of the parties. Thus, the only law of this case at the time of remand was that this Court issue an order to show cause. Therefore, petitioner's contention is without merit. Accordingly,

IT IS ORDERED that the respondents' motion to dismiss the petition for lack of jurisdiction is granted.

IT IS FURTHER ORDERED that respondents are stayed from removing petitioner from the District of Arizona pending a timely appeal to the United States Court of Appeals for the Ninth Circuit or until further order either of this Court or the Court of Appeals.

DATED February 10, 1970.

WM. P. COFFLE  
United States District Judge

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

[File Endoresment Omitted]

No. 25,525

ORDER—May 20, 1970

HERBERT PHILLIP SCHLANGER, PETITIONER-APPELLANT

v.

DR. ROBERT C. SEAMANS, JR., ET AL.,  
RESPONDENTS-APPELLEES

Before: BROWNING, CARTER, and WRIGHT, Circuit  
Judges

We have concluded that this case cannot be fairly distinguished from the recent decision of this court in *Jarrett v. Resor*, — F.2d — (9th Cir. January 23, 1970), and that the judgment must therefore be affirmed. Appellant's motion citing respondents for contempt is denied.

JAMES R. BROWNING  
JAMES M. CARTER  
EUGENE A. WRIGHT  
United States Circuit Judges

Dated: May 20, 1970

Herbert P. Schlanger  
P.O. Box 276  
Tempe, Az. 85281

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CA Number 25525

HERBERT PHILLIP SCHLANGER, APPLICANT-APPELLANT

*v.*

Hon. DR. ROBERT C. SEAMANS, JR., Secretary of the Air  
Force, ET AL., RESPONDENTS-APPELLEES

PETITION FOR REHEARING (INCLUDING SUGGESTION OF  
APPROPRIATENESS OF REHEARING EN BANC)—filed  
June 3, 1970

HERBERT PHILLIP SCHLANGER, pro se in forma pauperis, respectfully petitions this Court for a rehearing of its judgment and order, entered on May 20, 1970, in the above-captioned action affirming the district court's dismissal for lack of jurisdiction; the Court has, apprendering this action distinguishable from *Jarrett v. Resor*, — F.2d — (9 Cir., 1970), which was relied upon as the sole basis for affirmance. These facts clearly establish that Sgt. Schlanger was "both physically present in the court's territorial jurisdiction and (was) detained or held in custody within that jurisdiction", cf. *Rudick v. Laird*, 412 F.2d 16 (2 Cir, 1969); *Jarrett v. Resor*, supra. The facts leading to this conclusion clearly mandate a holding in line with *Word v. North Carolina*, 406 F.2d 352 (4 Cir, 1969), and *Donigian v. Laird*, 308 F. Supp. 449 (D. Md., 1969), the vacation of the order and judgment of May 20 and the remand of this case to the district court for a hearing into the merits.

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The points of law and fact relied upon are discussed in the remainder of this petition under the following headings:

- I. SGT. SCHLANGER WAS ASSIGNED TO ARIZONA AND WAS PRESENT IN ARIZONA AT THE TIME OF FILING THIS ACTION PURSUANT TO MILITARY DUTY ORDERS; HIS LEAVE WAS AN INTEGRAL PART OF THAT DUTY ASSIGNMENT;
- II. ASSIGNMENT BY THE MILITARY TO A PLACE FOR DUTY IS THE EQUIVALENT OF BEING "HELD IN CUSTODY" AT THAT PLACE;
- III. *JARRETT V. RESOR* DISTINGUISHED;
- IV. *DONIGIAN V. LAIRD* ANALOGIZED;
- V. EXTENSION OF THE *JARRETT* HOLDING TO THIS CASE WORKS HARDSHIP UPON PETITIONER, UNDERMINES THE PRINCIPLE OF *AHRENS V. CLARK*, AND CREATES A CONFLICT WITHIN THIS CIRCUIT AND BETWEEN THE CIRCUITS; SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC;

## VI. SUMMARY

- I. SGT. SCHLANGER WAS ASSIGNED TO ARIZONA AND WAS PRESENT IN ARIZONA AT THE TIME OF FILING THIS ACTION PURSUANT TO MILITARY DUTY ORDERS; HIS LEAVE WAS AN INTEGRAL PART OF THAT DUTY ASSIGNMENT.

The government concedes—indeed, asserts (appellees' brief, p. 6)—that Sgt. Schlanger was "issued orders. . . . authorizing seventy days' temporary duty (TDY) in Tempe, Arizona" and requiring him to return to Georgia "at the conclusion of the TDY and 15 days' leave." There is, therefore, no question but that Sgt. Schlanger was in Arizona pursuant to USAF duty orders and that he filed the action within the period covered by those assignment orders. Further, it is apparent that the leave was authorized "in conjunction with (the temporary duty)",

(appellees' brief, p. 2a), and was authorized *by his assignment orders*; moreover, the period characterized as "leave" is contained between two periods which are characterized as "temporary duty (TDY)". Sgt. Schlanger was still considered to have been assigned to Tempe, Arizona during this leave period.

Additionally, the government cannot now fairly maintain that one cannot bring habeas corpus at the place of a duty assignment which is temporary in nature. It was argued in *Jarrett*, by the appellees, that the District of Washington would have been a proper place for filing once he arrived at his embarkation port there—the most temporary of conceivable duty assignments.

## II. ASSIGNMENT BY THE MILITARY TO A PLACE FOR DUTY IS THE EQUIVALENT OF BEING "HELD IN CUSTODY" AT THAT PLACE.

An element of custody is, of course, essential for relief to be available through habeas corpus. The nature or extent of custody sufficient for habeas corpus has undergone significant change in recent years, however, e.g., *Jones v. Cunningham*, 371 U.S. 236 (1963); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968). Even in cases concerned with "custody" by military authorities there has been a broader view developing in keeping with these holdings of the Supreme Court, e.g., *Hammond v. Lenfest*, 398 F.2d 705 (2 Cir, 1968); *Donigian v. Laird*, *supra*. Indisputably, if there is sufficient military custody exercised over a reservist who has never been on active duty (cf. *Hammond*, *Donigian*) for habeas corpus to lie then there is, *a fortiori*, sufficient military custody over anyone on active duty for the writ to be available.

No court has ever held that a member of the military on leave is not in custody within the meaning of 28 USC 2241, et seq. The only question is where one in the military may file for relief at such a time, cf. *Jarrett*, *supra*. Certainly when one is on duty the proper place at which to file is the place to which he is assigned and performs his duty. Logically, the place of his assignment for duty is also the preferable place at which to file when

he is on leave from that duty assignment. Here, Sgt. Schlanger was assigned to Arizona (i.e., was on duty in Arizona) and was on leave within that duty assignment when the action was filed.

A member of the armed forces who is assigned for duty at a place is "in custody" at that place. This cannot be reasonably questioned. As indicated, it logically follows that custody—while on leave from any assignment—is exercised at the place of that assignment and must be contested at that place. It is uncontested that he assignment herein was to Tempe, Arizona, that the leave period was in conjunction with and a part of that assignment and that Sgt. Schlanger was on temporary duty in Arizona both prior to and after the filing of this action.

### III. JARRETT DISTINGUISHED

"Lt. Jarrett was not (at the time of commencement of the suit) being held in custody within the Northern District of California", *Jarrett*, supra, slip op. at p. 6

Sgt. Schlanger was, at the time of the commencement of the instant action, in custody within the District of Arizona by virtue of the orders assigning him to Arizona.

"A member of the armed forces who is voluntarily in a place other than an assigned post is not in custody in that place", *Jarrett*, supra, slip op. at p. 6, quoting *Rudick v. Laird*, supra, at pp. 20-21.

Sgt. Schlanger's assigned post was Arizona State University, Tempe, Arizona. The "voluntariness" of a petitioner's presence at an assigned post is of no consequence. Custody is exercised over him at that place of assignment.

A member of the military must be able to contest the restraints on his liberty even if he is granted a period of leave from his duty assignment; it has been held (*Jarrett*, *Rudick*, etc.) that the proper place to file such an action is at the place of assignment. That is what was done in the instant action.

"Lt. Jarrett. . . has never been assigned. . . within (the Northern District of California)", *Jarrett*, supra, slip op. at p. 6

Sgt. Schlanger was assigned to within the District of Arizona for a period of 85 days commencing on June 4, 1969; additionally, he had been assigned to Arizona State University, Tempe, Arizona from January, 1966 through July, 1968.

"(Lt. Jarrett) was free to go to (the Northern District of California), but he was not required to do so.", *Jarrett*, *supra*, slip op. at p. 6

Had Sgt. Schlanger gone anywhere *but* to Arizona when he was assigned to perform duty in Arizona he would have been AWOL; he *was* required to be in Arizona.

Lt. Jarrett was, at the time of filing, enroute from Ft. Knox, Kentucky, to a port of embarkation (McChord AFB, Washington) for shipment to Vietnam. The location at which he spent his leave was immaterial, incidental to and had no nexus with his military orders. Jurisdiction vested in the appropriate district of Kentucky until such time as he arrived at McChord AFB; then jurisdiction vested in the District of Washington.



Under these circumstances, jurisdiction vested in the District of Arizona—the District to which Sgt. Schlanger was temporarily assigned—from the time he signed out from Moody AFB until the time that he signed back in to Moody AFB. In this case the location of the leave was *not* incidental to the orders; there was a clear and direct connection. There *was* an assignment in Tempe, Arizona. Indeed, Sgt. Schlanger was in a temporary duty assignment status immediately preceeding and immediately following the leave, which was spent in Tempe, during which this action was filed.

#### IV. *DONIGIAN V. LAIRD* ANALOGIZED

Appellant commends to this Court's attention the reasoning of Judge Northrop in his decision of *Donigian v. Laird*, 308 F. Supp. 449 (D. Md., 1969), wherein he resolved a jurisdictional issue in circumstances similar to those of the present action. Lt. Donigian was attached to no unit at the time of filing; Sgt. Schlanger was detached from his unit. Lt. Donigian was attending, apparently at his own choice and expense, Johns Hopkins University; Sgt. Schlanger was attending Arizona State University pursuant to orders of the military. Lt. Donigian's activities were "directed" from Ft. Benjamin Harrison, Indiana; Sgt. Schlanger's from Moody AFB, Georgia. In both instances, military control was exercised over the petitioner from a point outside the state in which they were. Judge Northrop held that:

"The Army seeks to exert control over Donigian in Maryland. It cannot, then, avoid the jurisdiction of this court merely because such control is exercised from a point located outside this state. \* \* \* The overpowering factor in this inquiry is that the Army, regardless of where its physical command is located, is such a pervasive force that its effects are felt wherever those under its command are stationed."—*Donigian v. Laird*, *supra*, at p. 453

Moreover, Lt. Donigian's military contacts with the District of Maryland were far more tenuous than those demonstrated to have existed within the District of Ari-

zona as it relates to Sgt. Schlanger. Donigian, after all, was in *inactive reserve* status and was permitted to attend the university during that time. Sgt. Schlanger, on the other hand, was *on active duty* and was attending Arizona State University pursuant to USAF orders assigning him there. Furthermore, Sgt. Schlanger had been assigned to Arizona State University for 36 of the 44 months immediately preceding the filing of this action (January, 1966 through July, 1968; June, 1969 through August, 1969).

Beyond that, however, the government did not appeal the decision in *Doniger* when the Court ordered his discharge. It must therefore be assumed that the government feels that such an appeal would have been fruitless and that the jurisdictional reasoning of Judge Northrop was correct. Can the government maintain that the holding is acceptable in the Fourth Circuit while urging a contrary holding on the Ninth?

V. EXTENSION OF THE *JARRETT* HOLDING TO THIS CASE WOULD IMPOSE A HARDSHIP ON THE PETITIONER, UNDERMINES THE PRINCIPLE OF *ALBRECHT V. HANCOCK*, AND CREATES A CONFLICT WITHIN THE CIRCUIT AND BETWEEN THE CIRCUITS. THIS COURT HAS NO SUGGESTION OF APPROPRIATENESS OF HOLDING THE MATTER EN BANC.

To apply the hold on leave cannot bring in *Jarrett* (i.e., that a petitioner his assigned duty at habeas corpus at a place other than dismissal of this action) and contend that it supports the principle laid down for lack of jurisdiction extends and immediate consequence therein unreasonably. Its direct not at the place to which is to force a petitioner to file some remote point which he is assigned for duty but at military and technical which someone, designated by the stationed. No consideration considered his "custodian", is invasive nature of operation is then given to the truly inconvenience or military authority nor to the hardship, petitioner in being made which might be suffered by a in order to contest forced to undertake extensive travel him at his first local unlawful restraint exercised over action.

Moreover, since a petitioner is "in custody" at the place to which he is assigned for duty, habeas corpus must be sought in that district while the petitioner is physically present, *Ahrens v. Clark*, 335 U.S. 188 (1948). The result of this Court's earlier decision in this case is to force a petitioner to go to a particular district in order to create jurisdictional prerequisites; the holding in *Ahrens* maintains that a petitioner's presence, "in custody", determined the proper district in which to bring the action. (Amenability of respondents to process is provided by 28 USC 1391(e), as is pointed out in *Donigian*, supra, and presents no real problem.)

This Court has adhered to the principle of *Ahrens*, e.g., *Ashley v. State of Washington*, 394 F.2d 125 (9 Cir, 1968). Other circuits, notably the Fourth, have taken a broader view of the territorial jurisdictional requirement, e.g., *Word v. State of North Carolina*, 406 F.2d 352 (4 Cir, 1969). There it was held that prisoners held in Virginia could properly attack North Carolina sentences in either Virginia or North Carolina.

Therefore, if it is agreed that Sgt. Schlanger's assignment to Arizona placed him "in custody" in Arizona then this Court's earlier decision denying jurisdiction conflicts with *Ahrens* and *Ashley*. Alternatively, if for some reason it can be maintained that Sgt. Schlanger was "in custody" in Georgia while he was assigned to Arizona, then the decision is at odds with the trend in other circuits and serves to work undue hardship on the petitioner. In either case, it is suggested that the conflicts and inconsistencies might most appropriately be resolved by a rehearing en banc.

## VI. SUMMARY

It has, it is respectfully submitted, been demonstrated herein that:

- (a) *Jarrett* is distinguishable from the instant action by virtue of Sgt. Schlanger's assignment by the military to duty in Arizona and his presence in that district, pursuant to military orders, at the time of filing;
- (b) *Jarrett*, therefore, is not controlling in the instant case;

- (c) There are cases (most notably *Donigian v. Laird*, supra) in line with the holding urged by the appellant herein; this line is analogous to the instant action and lends itself to an equitable resolution of the jurisdictional issue; the government has acquiesced and assented to this line of reasoning without appeal;
- (d) A finding in appellant's favor would have application only in the special circumstances of this case, would avoid the conflicts noted, would not disturb this Court's holding in *Jarrett* and, in fact, would reinforce and clarify the rationale underlying that decision—habeas corpus relief must be sought at the place to which one is assigned for duty.

Should the Court retain any doubt about the ramifications and inferences drawn from the facts relating to Sgt. Schlanger's assignment to Arizona, or about any other relevant fact, this case should be remanded for a hearing on respondents' motion to dismiss, so that the issues might be explored and resolved through testimony and evidence.

For the foregoing reasons, appellant respectfully requests that this Court set aside its order of May 20, 1970 and, in light of this petition, reconsider its decision; further, appellant respectfully suggests that a rehearing of this case might appropriately be made en banc.

Additionally, appellant respectfully requests that this Court—should it deny rehearing or affirm its earlier decision—maintain in effect its injunction of May 26, 1970 pending timely filing and disposition of a petition for a writ of certiorari by the Supreme Court.

Respectfully submitted,

/s/ Herbert Phillip Schlanger  
HERBERT PHILLIP SCHLANGER,  
PRO SE

Dated: June 1, 1970  
Tempe, Arizona

Copy of petition mailed on June 2, 1970 to Mr. Robert Kopp at the Department of Justice, Washington, D.C.

/s/ Herbert Phillip Schlanger

IN THE UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

No. 25,525

[File Endorsement Omitted]

HERBERT PHILLIP SCHLANGER, PETITIONER-APPELLANT

*v.*

HONORABLE DR. ROBERT C. SEAMANS, JR., Secretary of  
the Air Force, ET AL., RESPONDENTS-APPELLEES

ORDER—June 17, 1970

Before: BROWNING, CARTER, and WRIGHT, Circuit  
Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: June 17, 1970

IN THE UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

No. 25,525

[File Endorsement Omitted]

HERBERT PHILLIP SCHLANGER, PETITIONER-APPELLANT

*v.*

HONORABLE DR. ROBERT C. SEAMANS, JR., Secretary of  
the Air Force, ET AL., RESPONDENTS-APPELLEES

ORDER

Before: BROWNING, Circuit Judge

The court's order filed June 23, 1970, staying the issuance of the judgment (mandate) to July 17, 1970, is vacated.

It is now the order of this court that the issuance under Rule 41(a) of the Federal Rules of Appellate Procedure of the mandate of the court in the above cause is hereby stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari provided such petition is filed by the appellant herein in the Clerk's office of the Supreme Court on or before July 2, 1970. In the event the petition for writ of certiorari is granted, this stay is to continue pending the final disposition of the case by the Supreme Court.

Provided appellant is still within the District of Arizona, it is further ordered that this court's order of May 26, 1970, staying the removal of the appellant from the District of Arizona shall remain in effect until July 2, 1970, at 4:00 P.M. Pacific Standard Time.

JAMES R. BROWNING  
United States Circuit Judge

## SUPREME COURT OF THE UNITED STATES

No. 5481, October Term 1970

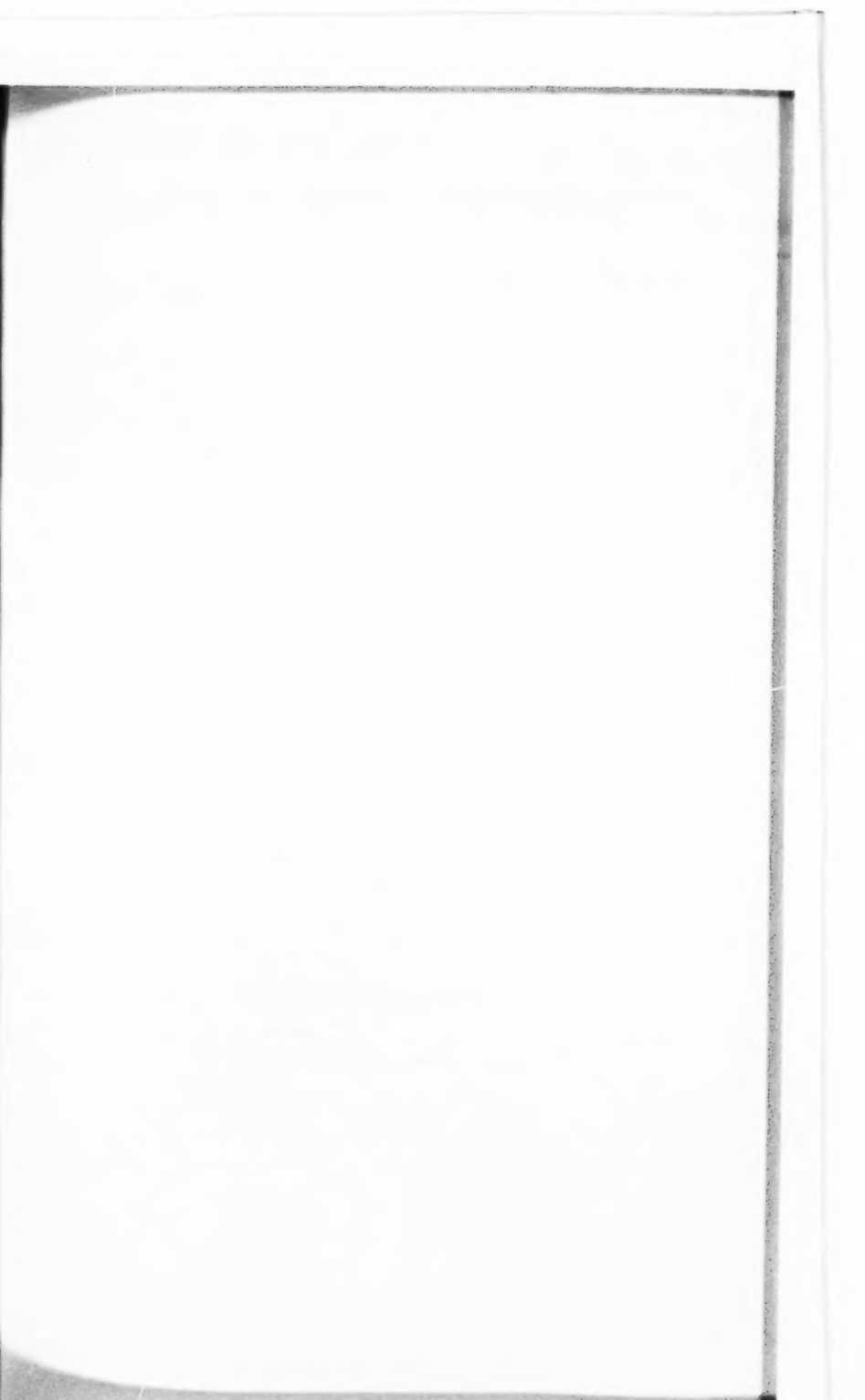
HERBERT PHILLIP SCHLANGER, PETITIONER

*v.*ROBERT C. SEAMANS, JR., Secretary of the Air Force,  
ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 19, 1970



# **PETITIONER'S BRIEF**

FILE COPY

FILED  
DEC 17 1970

E. ROBERT SEAVER, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

PETITION NOT PRINTED

RESPONSE NOT PRINTED

No. 5481

HERBERT PHILLIP SCHLANGER,

*Petitioner,*

v.

ROBERT C. SEAMANS, JR., Secretary of  
the Air Force, et al.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Herbert P. Schlanger, *Pro se*  
P.O. Box 276  
Tempe, Arizona 85281

(i)

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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1970

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**No. 5481**

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**HERBERT PHILLIP SCHLANGER,**

*Petitioner,*

v.

**ROBERT C. SEAMANS, JR., Secretary of  
the Air Force, et al.,**

*Respondents.*

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT*

---

**BRIEF FOR PETITIONER**

---

**OPINIONS BELOW**

No opinions in this case have been reported. Contained in the Appendix are the district court order of August 28, 1969 (dismissing for lack of jurisdiction) (A. 40), the Court of Appeals order of December 12, 1969 (remanding to the district court for issuance of a show cause order) (A. 41), the district court opinion and order of February 10, 1970

(dismissing for lack of jurisdiction) (A. 65), and the order of the Court of Appeals of May 20, 1970 (affirming the dismissal) (A. 68). No evidentiary hearing has been held.

## JURISDICTION

The order affirming the dismissal was entered by the Court of Appeals on May 20, 1970. A timely petition for rehearing (A. 69-79), including a suggestion of the appropriateness of rehearing *en banc*, was denied on June 17, 1970 (A. 80). The petition for a writ of certiorari was filed on July 2, 1970 and was granted on October 19, 1970. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Does a federal district court lack the power to inquire into the lawfulness of restraints exercised over a petitioner, who is a member of the armed forces, present in the district pursuant to orders issued by his commander who is in another state?

## STATUTES INVOLVED

Title 28, United States Code, Section 1391(e):

1391. Venue generally

\* \* \* \* \*

(e) A civil action in which each defendant is an officer of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

Title 28, United States Code, Section 2241:

2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

Title 28, United States Code, Section 2243

2243. Issuance of writ; return; hearing; decision;

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of the court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

## STATEMENT OF THE CASE

On December 7, 1962, SSgt. Schlanger enlisted in the United States Air Force. Three years later, on December 9, 1965, he re-enlisted for a period of six years, prior to, in reliance upon and as required for his entrance into the Airman's Education and Commissioning Program (AECF) for which he had been selected (A. 4, 33). The AECF is a program which provides "undergraduate education, followed by officer training and commissioning, for a selected number of carefully screened, career-minded airmen at selected civilian colleges and universities."<sup>1</sup>

In January, 1966, Sgt. Schlanger entered the AECF and was assigned to Wright-Patterson AFB, Ohio, "with duty at Arizona State University" (A. 7); that duty was, primarily, the satisfactory completion of his degree program at the University.<sup>2</sup> He was progressing satisfactorily when, in June of 1968, ten weeks before his scheduled graduation, he was summarily removed from the program, ordered to withdraw from the University and placed in a state of arrest by AFIT authorities in Ohio (A. 5, 13); he was, despite his requests, denied a hearing or access to any evidence which might have been used in reaching the decision to remove him (A. 6, 18, 20, 28-31, 32). He was, additionally, informed that there were "[no] statutory provisions for appeal of the Commandant's decision to withdraw [him] from the AECF" (A. 22). Though he was removed purportedly for having demonstrated a "lack of officer potential" by allegedly cutting some classes (A. 6, 17), the removal was precipitated by Sgt. Schlanger's formation and leadership of the Arizona State University Civil Rights Board—a campus organization which sought to alleviate growing racial tensions through mediation, communication and recourse to legal remedies for solution of racial and ethnic grievances arising on and around the campus (A. 30, 38).

---

<sup>1</sup>"Guidebook for the AECF," p. 1 (AFIT, AU, WPAFB, O).

<sup>2</sup>"AFIT Student Manual," paragraph 1-7.

According to the petition (A. 4, paragraph 10; A. 8, paragraph 30), it was these actions, *i.e.*, the removal of Sgt. Schlanger from the Airman's Education and Commissioning Program (AECPP) and the denial of a commission, which breached and rendered void the re-enlistment contract.

Sgt. Schlanger appealed through command channels for a hearing, access to evidence and re-instatement (A. 28-31); while attempting to secure redress through these channels, his status was changed from that of an "officer trainee," he was demoted and re-assigned to Moody AFB, Georgia, to complete the remainder of his six year re-enlistment in a non-commissioned status (A. 20).

On May 28, 1969, having unsuccessfully exhausted his administrative remedies and having been denied a discharge (A. 33-39) and having, in the opinion of his military superiors at Moody AFB, performed his duties in an "outstanding manner,"<sup>3</sup> he was issued temporary duty (TDY) assignment orders which assigned him to Arizona State University to complete his degree requirements (under a different program and at his own expense) (A. 47, 51). These orders assigned Sgt. Schlanger to Tempe, Arizona, for a period of 85 days (June 4 through August 29, 1969), seventy days of which were to be considered "duty" days and 15 as "leave" (A. 47, 51).

On August 27, 1969, Sgt. Schlanger filed his application for a writ of habeas corpus (alleging that, his re-enlistment contract having been irremediably breached, he was being restrained detained unlawfully) in the district court for the District of Arizona. The action was immediately dismissed by the court, *sua sponte*, on August 28, 1969 (A. 40) and reconsideration was denied on September 5, 1969. Sgt. Schlanger appealed, requested expeditious action and

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<sup>3</sup>This characterization of the nature of SSgt. Schlanger's service is reflected in his performance reports, letters of recommendation and recognition, and promotion to non-commissioned officer ranks (first to sergeant and, more recently, to staff sergeant).

returned, as ordered, to Moody AFB, Georgia. Granted leave in December, he argued his appeal before the Court of Appeals for the Ninth Circuit; an order was entered setting aside the order dismissing the petition and the case was returned to the district court for issuance of a show cause order "and further proceedings thereon" (A. 41). An order was subsequently entered which stayed the military authorities from removing Sgt. Schlanger, or ordering or causing his removal from Arizona (A. 43). Despite this order, Sgt. Schlanger was informed that should he fail to return to Moody AFB, Georgia, by January 18, 1970, his pay and allowances would be terminated (which they were). Later, Sgt. Schlanger was ordered by the respondents to report to Shaw AFB, S.C., preparatory to shipment to Southeast Asia; these instructions were suspended only after Sgt. Schlanger moved to have the respondents cited for contempt of court.

Upon remand, the petition was again dismissed without a hearing, on respondents' motion, for lack of jurisdiction (A. 65-68). An appeal was immediately taken, expeditious action being requested. Following oral argument, the Court of Appeals affirmed and, as noted, denied rehearing.

### SUMMARY OF ARGUMENT

It is now widely recognized that a member of the armed forces is "in custody" within the meaning of Title 28, United States Code, Section 2241. It also seems to be beyond question that, when a serviceman is granted "leave" from his duty assignment, he remains "in custody" during that period. When a serviceman is physically present within a district, and petitions for habeas corpus there, he is, therefore, obviously "in custody" within that court's jurisdiction. The court must, however, initially decide: (1) whether he states a cause of action cognizable in a federal district court, (2) whether the action is properly brought in that particular district court, and (3) whether the court has jurisdiction over the parties. In other words, the court

must find subject matter jurisdiction, venue jurisdiction and personal jurisdiction.

In this action, the lower courts had subject matter jurisdiction: Sgt. Schlanger is being restrained of his liberty by officers of the United States Air Force under color of authority of the United States. This custody is unlawful since the re-enlistment contract, in accordance with whose terms Sgt. Schlanger was serving, was breached and rendered void by the USAF authorities; there is *no* valid enlistment agreement in force at this time. Venue was properly laid in Arizona since Sgt. Schlanger was present in that district pursuant to military duty orders, the cause of action arose in Arizona, all relevant witnesses and records not subject to military custody and control were in Arizona and the government was not inconvenienced by having to defend the suit there. Venue and personal jurisdiction over the respondents is conferred by Title 28, United States Code, Section 1391(e).

In *Ahrens v. Clark*, 335 U.S. 188 (1948), this Court held that, except in the most unusual circumstances, the presence of the petitioner within a district court's territorial jurisdiction is a necessary prerequisite to initiation of an action for habeas corpus. In 1948, however, there were very few potential petitioners who would have been unable to name a proper respondent within the district in which they were restrained; the expansion of the scope of the Great Writ, with the changes in the nature and extent of custody necessary for it to be available which have been wrought by this Court through its recent decisions, has created an entirely new class of petitioner. Since many of these petitioners may *not* be subject to restraint by anyone within the district in which they reside, there is compelling reason to reinforce the holding of *Ahrens*: the Great Writ, to fulfill its historic purpose as an easily accessible, expeditious means of testing the lawfulness of restraint, must be readily available in a forum convenient to the petitioner. To require a petitioner, who like Sgt. Schlanger is subject

to restraint *wherever* he is, to travel across the continent in order to contest that restraint is contrary to the spirit of habeas corpus. Moreover, it is totally unnecessary when the restraint complained of is imposed by an officer, agency or branch of the United States since Title 28, United States Code, Section 1391(e) provides for service of process in this instance.

## ARGUMENT

### 1. THE QUESTION DEFINED

The principle laid down by the Ninth Circuit in *Jarrett v. Resor*, 426 F.2d 213 (1970), and extended to include this action, presents some conceptual difficulties. Sgt. Schlanger filed his petition while he was in Arizona, on leave, following a duty assignment in Arizona and prior to leaving Arizona for his base in Georgia; yet in dismissing this action, the Ninth Circuit relied solely on *Jarrett, supra*, which held that a member of the armed forces who is "voluntarily at a place other than his assigned duty station is not in custody at that place."

If it is being suggested that Sgt. Schlanger was not in custody at all at the time that the action was commenced, then obviously an action in habeas corpus would not lie. But, as has often been pointed out, this Court has through its recent decisions (*Jones v. Cunningham*, 371 U.S. 236; *Carafas v. LaVallee*, 391 U.S. 234; *Peyton v. Rowe*, 391 U.S. 54), significantly altered the concept of the nature and extent of "custody" necessary before relief through habeas corpus would be available. In line with these decisions, it is now well-established that amenability to military orders and control constitutes sufficient restraint for habeas corpus.

If this tenet—that *all* military personnel are "in custody" for purposes of jurisdiction under 28 U.S.C. § 2241—is accepted, then the question of which district or districts have jurisdiction over this action is essentially one of venue.

Once the requisite "custody" is found, then the district in which the petitioner is actually lawfully physically present is always at least a permissible jurisdiction; he is in custody within the jurisdiction of the court in whose district he is, cf. *Ahrens v. Clark*, 335 U.S. 188 (1948); 28 U.S.C. § 2241.

## 2. SUBJECT MATTER JURISDICTION: "CUSTODY"

This Court has noted that habeas corpus has been accepted as the proper vehicle for testing the lawfulness of induction or enlistment into the armed forces, *Jones v. Cunningham*, 371 U.S. 236, 240. Just as there is by now no question that the restraints imposed on one's liberty by military service are sufficient for habeas corpus to be available to contest them, *Hammond v. Lenfest*, 398 F.2d 705, 710, it also seems beyond question that a member of the armed forces remains sufficiently "in custody" for habeas corpus to lie when he is granted a period of leave from his assigned duties, e.g., *Lohmeyer v. Laird*, 3 S.S.L.R. 3072; *Laxer v. Cushman*, 300 F.Supp. 920. While on leave a serviceman remains subject to military regulations and authority; his travel is restricted; he must secure permission to engage in employment (R. 113); he is subject to summary recall. Moreover, the requirement that he return to duty at a specific place by a specific date unarguably constitutes constructive custody. These are all restraints not shared by the public generally, cf. *Jones v. Cunningham*, 371 U.S. 236, and they form a leash which binds the serviceman wherever he is.

Since Sgt. Schlanger was lawfully in Arizona at the time of filing, and was "in custody" on that date, then—in order to sustain the proposition that he was not "in custody within the jurisdiction of the district court for Arizona—it must be assumed that, for purposes of habeas corpus, custody attaches not to where its effects are felt but to the place where the authority, resulting in those effects, is exercised.

This interpretation, however, was explicitly rejected by this Court in *Ahrens v. Clark*, 335 U.S. 188 (1948), wherein it was held that it was the *petitioner's* presence within the territorial jurisdiction of the district court which gave the court jurisdiction to entertain the petition. In that case, as in the one at bar, the question of the proper respondent was not reached; it was held that, no matter who the proper respondent was, that action should have properly been brought in New York since that was where the effects of the restraint complained of were being felt, that is, where the petitioners were in custody. In the instant action, of course, Sgt. Schlanger *did* file his petition in Arizona, while he was lawfully present in Arizona, complaining of the restraints upon his liberty in Arizona.

### 3. SUBJECT MATTER JURISDICTION: STATING A CLAIM

Beyond determining that it has subject matter jurisdiction under 28 U.S.C. § 2241, *i.e.*, that the petitioner is in custody within its jurisdiction, a court must initially determine whether he states a claim on which relief can be granted. This initial determination, from the face of the petition, should, of course, be made in the light most favorable to the petitioner, cf. *Townsend v. Sain*, 365 U.S. 866 (1961); *Price v. Johnston*, 334 U.S. 266 (1948), but nevertheless it is apparent that Sgt. Schlanger states such a claim.

Though most servicemen seeking habeas corpus relief are appealing to the civil courts from denials, by the military authorities, of their discharge applications in which they claimed status as "conscientious objectors" (which status would entitle them to be discharged under existing regulations),<sup>4</sup> Sgt. Schlanger alleges no such thing. To the contrary, it appears that he intended to make the Air Force his

<sup>4</sup>See generally, Hansen, "Judicial Review of In-Service Conscientious Objector Claims", 17 UCLA L. Rev. 975.

career as a commissioned officer.<sup>5</sup> The unlawfulness of current restraints upon his liberty stems not from any change of belief on his part, nor from any irregularity in his initial enlistment or re-enlistment, but from the failure and refusal of the USAF authorities to fulfill the terms and conditions of his re-enlistment contract.

That re-enlistment was entered into in accordance with the regulations governing the Airman's Education and Commissioning Program (AECP) (AFM 50-5) and following the issuance of written orders (which were to take effect only if and when Sgt. Schlanger re-enlisted for six years) which designated Sgt. Schlanger an "officer trainee" and assigned him to the Air Force Institute of Technology (AFIT) with duty at Arizona State University, for participation in the AECP (A. 4). Though there is little evidence in the record at this time as to the effects of this re-enlistment and of these orders on Sgt. Schlanger's status, and as to the terms and conditions of the re-enlistment contract, it must be assumed—as alleged and not controverted—that the primary, if not the *sole* purpose of Sgt. Schlanger's re-enlistment was for him to obtain a commission and serve as an officer (A. 4, 33).

As Mr. Justice Frankfurter said, "Receiving a commission is clearly not a matter of right; but granting it may be a condition for retaining a person in the Army," *Orloff v. Willoughby*, 345 U.S. 83, 97 (1953).<sup>6</sup> This formulation was given effect the following year by the Court of Appeals for the Fourth Circuit when a doctor, inducted under the Doctor's Draft Act (which had been revised, in light of the

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<sup>5</sup>As previously noted, participation in the Airman's Education and Commissioning Program (AECP), for which Sgt. Schlanger re-enlisted, is offered only to "carefully screened, *career-minded* airmen", (emphasis supplied).

<sup>6</sup>Though this was pointed out in dissent, it is nowhere even implicitly disputed by the majority and is not inconsistent with the Court's holding, *i.e.*, that review of duty assignments cannot be obtained through habeas corpus.

decision in *Orloff, supra*, to require the commissioning of those drafted under its provisions), was refused a commission by the Army; the court ordered him discharged. *Nelson v. Peckham*, 210 F.2d 575 (1954).

Certainly an inducement offered by the military (under existing regulations and, in this case, through promulgation of written orders whose execution is contingent upon the re-enlistment) to entice a re-enlistment is no less binding upon the government, once it is accepted, than the requirements of a statute. As the Attorney General has advised:

"Enlistments into the Army made under the inducements held out by the laws of the United States are 'contracts' and although the government be a party, still the contracts ought to be construed according to those well-established principles which regulate contracts generally." 6 Op. 187.

It is admittedly rare that the civil courts are asked to review the obligations of the military under an enlistment contract. More often than not, the courts will decline to grant such review; since an enlistment is a contract which changes the status of an enlistee, *United States v. Grimley*, 137 U.S. 147, most procedural or non-material irregularities are insufficient to nullify the agreement. Furthermore, as this Court has properly pointed out, "\* \* \* judges are not given the task of running the Army," *Orloff v. Willoughby*, 345 U.S. 83, 93. But here Sgt. Schlanger is *not* asking the courts to review his duty assignments, nor any other matter which must properly be left to the discretion of the military authorities. The basic question is whether Sgt. Schlanger was lawfully denied the status of a commissioned officer, after having been induced to re-enlist by its offer. Unless, inducements and promises by the military notwithstanding, an enlistment gives the military *carte blanche* to do what they will with an enlistee, then—if the denial of a commission to Sgt. Schlanger was unlawful<sup>7</sup>—the restraints

<sup>7</sup>In his petition for the writ of habeas corpus, Sgt. Schlanger contends that: (a) there was no basis in fact for his removal from the

upon his liberty in his current status as an enlisted man are unlawful.

#### 4. VENUE

The distinction between subject matter jurisdiction ("custody") and venue is basic to this case. To hold that a serviceman may bring a habeas corpus action only at some particular place designated by the military authorities as his "permanent duty station" and at which someone technically considered his "custodian" resides is to not only ignore the realities of military service, but exalts form over substance and does violence to the spirit and purpose of the Great Writ.

Too, this policy may well create a judicial vacuum. In the case at bar the government conceded (Respondents' appeal brief, p. 8, fn. 5) that Sgt. Schlanger's duty/leave status on the day of filing is not controlling,<sup>8</sup> and then asserted:

"\* \* \* even if \* \* \* [Sgt. Schlanger] was not in leave status but on temporary duty status in Tempe, Arizona, jurisdiction is wanting. For \* \* \* [he] was never in the custody of the sole defendant within the district court's jurisdiction \* \* \*."<sup>9</sup>

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commissioning program and for the denial of a commission, (b) that he was removed as a direct result of his exercise of his first amendment rights, and (c) the removal was based on proceedings prejudicial to him, carried out in violation of Air Force regulations and violative of the due process requirements of the fifth amendment.

<sup>8</sup>It should be noted that the temporary duty orders assigning Sgt. Schlanger to Arizona (A. 51) do not specify which of the 85 days are 'duty' days and which are "leave." This was a designation made, by the military authorities, after Sgt. Schlanger's arrival in Georgia in September, 1969.

<sup>9</sup>Colonel Noel B. Reddrick, Commander, ROTC Det. 25, Arizona State University. Although Col. Reddrick was not in Sgt. Schlanger's formal "chain of command," he did, in fact, have authority over Sgt. Schlanger both in his capacity as a commissioned officer and as the commander of the only USAF organization at the place to which Sgt. Schlanger had been assigned for duty, i.e., Arizona State University.

A member of the armed forces, assigned to perform duty at some place other than his "permanent duty station" (as was Sgt. Schlanger during June, July and August, 1969), is *not* free to travel; he *cannot*, without being A.W.O.L., return to his "permanent duty station." (He may, in fact, have only nominal contacts with that station. For instance, Sgt. Schlanger was assigned to a "permanent duty station" in Ohio for the entire period during which he was in the Airman's Education and Commissioning Program [January, 1966 through July, 1968] and yet he was never physically in Ohio!) Since his presence, in custody, within the district is a prerequisite to initiation of an action for habeas corpus, cf. *Ahrens v. Clark, supra*, he is left without a forum even though he is being restrained of his liberty within the jurisdiction of a district court.

Judge Northrop, of the District of Maryland, was faced with a similar problem in *Donigian v. Laird*, 308 F.Supp. 449, and decided:

"The Army seeks to exert control over Donigian in Maryland. It cannot, then, avoid the jurisdiction of this court merely because such control is exercised from a point located outside this state. \* \* \* The overpowering factor in this inquiry is that the Army, regardless of where its physical command is located, is such a pervasive force that its effects are felt wherever those under its command are stationed." *Donigian v. Laird*, at p. 453.

Indeed, the effects of being a member of the armed forces are felt not only where those under military authority are stationed but, since the military claims continuous jurisdiction, they are felt at all times and at all places a member may be.

In the case at bar, a defense of "improper venue" could have—indeed, should have—been raised had Sgt. Schlanger commenced the action in any district *but* Arizona. The cause of action (his removal from the Airman's Education and Commissioning Program) arose in Arizona, cf. 28 U.S.C. § 1391(e)(2), he was a legal resident of Arizona, cf. 28

U.S.C. § 1391(e)(4), he had been assigned by the military to Arizona for 46 of the 62 months preceding the filing of the action (July, 1963-April, 1965; January, 1966-July, 1968; June, 1969-August, 1969), he was lawfully present in Arizona, having gone there pursuant to temporary duty assignment orders, and he had not left the place of that assignment (Tempe, Arizona) before filing his petition, after completion of his duty; moreover, all relevant witnesses and records which are not subject to control of the respondents were in Arizona. Sgt. Schlanger's assignment to a "permanent [sic] duty station" in Georgia is wholly incidental to this action and should not enter into consideration. Furthermore, the government would be no more inconvenienced by having to defend this action in Arizona than they would in any other district. The military has adequate representation in the district (as they do in all districts) through the U.S. Attorney, any files are easily transportable and there was no need to transport Sgt. Schlanger anywhere—he was already in the district.

##### 5. PERSONAL JURISDICTION; REACH OF PROCESS

While it is obvious that neither Dr. Seamans nor Colonel Baker, the respondents alleged to be unlawfully restraining Sgt. Schlanger, reside within the District of Arizona, this does not deprive that court of jurisdiction over them. They are being sued not as individuals, but as officers of the United States; and although until 1962, under the then existing provisions of 28 U.S.C. 1391(b), such officers were amenable to suit only in the districts of their respective official residences, this section was amended to add subsection (e) which provides, *inter alia*, that:

"A civil action in which each defendant is an officer or employee of the United States \* \* \* acting in his official capacity \* \* \* may \* \* \* be brought in any judicial district in which \* \* \* (2) the cause of action arose, or \* \* \* (4) the plaintiff resides \* \* \*."

The import of this change in section 1391 has been considered by Professor Moore, and he comments:

“\* \* \* This subsection realistically broadens venue in *any* civil action (not just mandamus proceedings) where each defendant is a federal officer, \* \* \* and is sued for acts done in his official capacity or under color of legal authority; *and provides for extra-territorial service of process, if necessary, in such an action.*

\* \* \* \* \*

“In brief, the Act added to but did not take away subject-matter jurisdiction which the district courts already had. \* \* \* *Its purpose was to make it possible to bring a civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, in district court outside of the District of Columbia* \* \* \*,” Moore’s *Federal Practice*, 2nd Ed., pp. 1210-1211 (emphasis supplied).

In addition to this authoritative interpretation of the statute, the judicial trend has been to give effect to this reading, e.g., *Lohmeyer v. Laird*, \_\_\_ F.Supp. \_\_\_, 3 S.S.L.R. 3072, 3074 (D. Md., 1970); *Metz v. United States*, 304 F.Supp. 207 (W.D. Pa., 1969); *Silberberg v. Willis*, 306 F.Supp. 1013 (D. Mass., 1969).

Habeas corpus has, of course, long been recognized to be a “civil action,” e.g., *Fisher v. Baker*, 203 U.S. 174; *Ex parte Tom Tong*, 108 U.S. 556, but, as has been pointed out, habeas corpus is unique, *Harris v. Nelson*, 394 U.S. 286, 294, and there has been a lack of uniformity in the application of the procedures used in civil practice to habeas corpus proceedings, e.g., cases cited in *Harris v. Nelson*, *supra*, fn. 1, at p. 289. There is no doubt, however, that the federal courts may fashion appropriate procedures for use in habeas corpus.

A reading of Senate Report No. 1992, 87th Congress, 2nd Session, to accompany H.R. 1960, 2 U.S. Code Cong.

and *Adm. News* (1962), p. 1784, confirms the view that subsection (e) of section 1391 is applicable to habeas corpus, cf. *Lohmeyer v. Laird*, 3 S.S.L.R. 3072, 3074. As Mr. Justice White wrote, while serving as Assistant Attorney General, "Under [pre-1962] law, after one has exhausted his administrative remedies, the final decision is generally made by an official residing in the District of Columbia. To challenge the legality of that decision, the officer residing in Washington must be sued in Washington. The purpose of [section 2 of H.R. 1960] is to have officers who live in the Capital subject to suit throughout the country to the same extent that they can now be sued in the District. In effect, then, this venue provision would do away with the defense that a superior officer is an indispensable party because, with a grant of venue, a superior officer can be made a party." 2 *U.S. Code Cong. and Adm. News* (1962), p. 2789.

This is precisely the situation in the present case. Sgt. Schlanger has been denied a discharge by the Chief of Staff, USAF, and by the Secretary of the Air Force. Under the law (10 U.S.C. § 8811; AFR 39-10), only the Secretary has authority to discharge him and is thus an indispensable party.

There is no suggestion in the legislative history of H.R. 1960 that habeas corpus proceedings were to be exempted from the provisions of the bill; the broadened jurisdiction and venue provisions apply to "non-statutory" judicial review proceedings, and the limitations of the phrase "except as otherwise provided by law" were clearly intended to apply only to actions controlled by other explicit jurisdictional statutes, e.g., tax cases, Senate Report No. 1992, *supra*. The Justice Department's suggestion that the venue provision of this bill should be limited to actions brought under 5 U.S.C. 1009, the Administrative Procedure Act, was not adopted and the language of the bill remained broad, applying to any civil action.

## 6. EFFECTS AND CONSIDERATIONS

There are compelling reasons for this Court to apply the intentionally broad language of 28 U.S.C. § 1391(e) to actions such as the one at bar. In 1962, when H.R. 1960 was passed, as in 1948 when *Ahrens v. Clark*, 335 U.S. 188, was decided, it was a rare petitioner who could not name a proper respondent within the district in which he was being restrained. Commencing with *Jones v. Cunningham*, 371 U.S. 236, however, this Court embarked on an historic expansion of the Great Writ's availability. These recent decisions have created "an entirely new class of habeas corpus petitioners \* \* \*," *United States ex rel. Meadows v. State of New York*, 426 F.2d 1176, 1181 (2 Cir., 1970), and have raised jurisdictional problems not hitherto encountered, e.g., *George v. Nelson*, 410 F.2d 1179 (9 Cir., 1969) (California district court had jurisdiction over habeas corpus petition brought by a prisoner in California, attacking a future sentence in North Carolina).

This "new class of petitioner" includes a member of the armed forces, who is subject not to physical confinement but to other, less tangible but no less real, restraints. These restraints are imposed not by steel bars and concrete walls but by the force of law. They are extant wherever he may be, subjecting him to a remote control by his superior officers in the military hierarchy.<sup>10</sup> Failure to obey an order, however received—in person, by mail, by telephone, renders him liable to trial by court-martial. And this line of authority forms a two-way street: the military cannot purport to have jurisdiction over a person, twenty-four hours a day, seven days a week, *wherever* he may be, and simultaneously deny that he is in custody within the juris-

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<sup>10</sup>This "remote control" is readily evident in the record of this case. The letter from Col. Palmer in Ohio to Sgt. Schlanger in Arizona (A. 13) amply illustrates the "custody" exercised over a serviceman even from 2000 miles away. There is no doubt that Sgt. Schlanger's current commander possessed the same power to control and restrain his actions at the time this suit was instituted.

diction of whatever district court he may find himself, cf. *Laxer v. Cushman*, 300 F.Supp. 920; *Silberberg v. Willis*, 306 F.Supp. 1013; *Lohmeyer v. Laird*, 3 S.S.L.R. 3072. (It is, perhaps, significant that the government filed a notice of appeal in *Lohmeyer*, but requested dismissal after the Solicitor General declined to prosecute it.) If, as the government asserted, Sgt. Schlanger was *not* in custody in Arizona, why was an injunction necessary to prevent his removal (A. 43)? (Similar injunctions were necessary in *Jarrett v. Resor*, 426 F.2d 213, *Hammond v. Lenfest*, 398 F.2d 705, *Laxer v. Cushman*, 300 F.Supp. 920, and *Feliciano v. Laird*, 426 F.2d 424, among others.)

The lower courts should certainly be wary of forum-shopping, as they apparently are. (It would seem that the concern with avoidance of forum-shopping has led unnecessarily to a more restrictive attitude when confronted with active duty servicemen than when petitions are presented by reservists; compare *Jarrett v. Resor*, 426 F.2d 213, *Rudick v. Laird*, 412 F.2d 16, and the case at bar [all active duty petitioners], with *Donigian v. Laird*, 308 F.Supp. 449 [D. Md., 1969], *Hammond v. Lenfest*, 398 F.2d 705 [reservist petitioners]). Moreover, the evils of forum-shopping are hardly serious enough to require foreclosure of access to all districts but that one in which a serviceman's "permanent duty station" is located. Since forum-shopping leads to considerations of venue, rather than jurisdiction, the district court could exercise its discretion and dismiss or transfer an action as having been brought in a *forum non conveniens*; this was the result in *McKay v. Secretary of the Air Force*, 306 F.Supp. 1252 (D. Mass., 1969), where the applicant came into the district with little more than a suitcase and a petition, and had had no prior contacts. More importantly, however, the Great Writ "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose \* \* \*," *Jones v. Cunningham*, 371 U.S. 236, 243. To prevent an individual from filing in the district in which

he is, is to add an arbitrary and unnecessary burden to the shoulders of a petitioner.

This Court should formally recognize that a member of the armed forces is (so long as he is amenable to the control, orders and jurisdiction of the military authorities) "in custody" at all times and at all places; considerations of venue should determine the proper court in which to bring an action in habeas corpus. Whatever rational criteria are applied, though, it is clear that Sgt. Schlanger properly brought this action in Arizona.

### CONCLUSION

The district court for the District of Arizona had jurisdiction over the subject matter under 28 U.S.C. 2241, Sgt. Schlanger has stated a claim on which relief can be granted, venue was properly laid in Arizona, and the court had personal jurisdiction over the respondents, as officers of the United States. For all the foregoing reasons, it is respectfully submitted that the judgments and orders of the courts below should be reversed and the case remanded to the district court for a hearing on the merits.

Respectfully submitted,

HERBERT P. SCHLANGER

P. O. Box 276

Tempe, Arizona 85281

*Attorney Pro Se*

FILE COPY

DEC 24 1970

E. ROBERT SEAMANS, JR.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

**No. 5481**

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HERBERT PHILLIP SCHLANGER,

*Petitioner,*

—v.—

HON. DR. ROBERT C. SEAMANS, JR., Secretary of the Air  
Force; COL. HOMER A. BAKER, Commander, Moody Air  
Force Base, Georgia; COL. NOEL B. REDDRICK, Comman-  
der, AFROTC Det 25, Arizona State University,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION**  
***AMICUS CURIAE***

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MELVIN L. WULF

JOEL M. GORA

American Civil Liberties Union  
156 Fifth Avenue  
New York, New York 10010

*Attorneys for Amicus Curiae*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

**No. 5481**

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HERBERT PHILLIP SCHLANGER,

*Petitioner,*

—v.—

HON. DR. ROBERT C. SEAMANS, JR., Secretary of the Air Force; COL. HOMER A. BAKER, Commander, Moody Air Force Base, Georgia; COL. NOEL B. REDDRICK, Commander, AFROTC Det 25, Arizona State University,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION**  
***AMICUS CURIAE***

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**Interest of *Amicus*\***

The American Civil Liberties Union is a nationwide, non-partisan organization engaged solely in the defense of those liberties guaranteed by the Bill of Rights. In its fifty-year existence it has been particularly concerned that procedural

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\* Letters of consent from the petitioner and the respondent to the filing of this brief have been filed with the Clerk of the Court.

remedies, particularly ones such as the Great Writ, be fully available to rectify the denial of civil liberties.

In recent years, the American Civil Liberties Union has provided legal representation to hundreds of servicemen who have sought release from military custody because their rights of free expression, religious liberty, or due process of law have been infringed. Habeas corpus has been the primary vehicle for safeguarding those substantive rights.

The decisions below take an unnecessarily restrictive view of the availability of habeas corpus to military petitioners. The writ has proven flexible in other contexts and on behalf of other types of petitioners. We believe it must be responsive to the newer types of demands represented in this case.

### **Statement of the Case**

Herbert P. Schlanger enlisted in the United States Air Force on December 7, 1962. Three years later he re-enlisted for a period of six years and entered the Airman's Education and Commissioning Program (AECP). The AECP provided for "undergraduate education, followed by officer training and commissioning, for a selected number of carefully screened, career-minded airmen at selected civilian colleges and universities."<sup>1</sup>

In January, 1966, Sgt. Schlanger entered the AECP and was assigned to Wright-Patterson Air Force Base, Ohio "with duty at Arizona State University" (R. 2, 18); that duty was, primarily, the satisfactory completion of his

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<sup>1</sup> "Guidebook for the AECP", p. 1 (AFIT, AU, WPAFB, O).

academic program.<sup>2</sup> In June of 1968, while progressing satisfactorily toward completion of his degree program and with his scheduled graduation only ten weeks away, petitioner was summarily removed from the program, ordered to withdraw from the University and placed in a state of arrest (R. 4). The removal was precipitated by his formation and leadership of the "ASU Civil Rights Board"—a campus organization which sought through mediation, communication and recourse to legal channels to alleviate growing racial tensions which had arisen on the ASU campus (R. 23, 24).

While Sgt. Schlanger was seeking an administrative remedy of his removal from the AECP program and denial of a commission, he was demoted and re-assigned to Moody Air Force Base, Georgia to complete the remainder of his six-year enlistment in a non-commissioned status (R. 5, 19).

On May 28, 1969, having unsuccessfully exhausted his administrative remedies (R. 5, 31) and having, in the opinion of his military superiors, performed his duties at Moody in an "outstanding manner,"<sup>3</sup> he was issued temporary duty (TDY) assignment orders which re-assigned him to Arizona State University to complete, under a different program at his own expense, his degree requirements. These orders assigned him to Tempe, Arizona, for a period of 85 days (June 4 through August 29, 1969), seventy days of which were designated as "duty" and 15 as "leave." The precise distribution between these two categories was not specified.

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<sup>2</sup> "AFIT Student Manual", para. 1-7.

<sup>3</sup> This characterization of Sgt. Schlanger's service is reflected in his performance reports, letter of recognition and recommendation of this TDY.

On August 27, 1969, Sgt. Schlanger filed his application for a writ of habeas corpus in the United States District Court of Arizona. At that time, as before, he was present within that jurisdiction pursuant to the temporary duty assignment orders issued from Moody AFB, Georgia. Furthermore, he was clearly within the period of time covered by these orders. He named as respondents Dr. Robert Seamans, the Secretary of the Air Force, Colonel Homer Baker, the Commander at Moody AFB and Colonel Noel Reddick, the Commander of the Air Force ROTC detachment at Arizona State University.

The petition was summarily dismissed by District Judge Copple on August 29, 1969 and reconsideration was denied on September 5, 1969. Sgt. Schlanger filed his appeal and returned, as ordered, to Moody AFB, Georgia. He was subsequently granted leave from Moody on December 9, 1969, in order to argue his appeal to the Ninth Circuit. That Court vacated and remanded for further consideration.

Thereafter, the District Court, per Judge Copple, dismissed the petition for lack of jurisdiction, because "neither the Secretary [of the Air Force] nor the commanding officer is within the territorial jurisdiction of the District Court or within reach of the Court's process . . . " *Schlanger v. Seamans*, 3 SSLR 3323 (D. Ariz. 1970). The essence of the ruling was that there was no proper respondent within the district. The opinion did not discuss the effect of joining Colonel Reddick as a respondent. The United States Court of Appeals affirmed in a one paragraph order, concluding that the case was indistinguishable from its earlier decision in *Jarrett v. Resor*, 426 F.2d 213 (9th Cir. 1970).

## Introduction

### ARGUMENT

The District Court held that it was without jurisdiction to entertain this habeas corpus application because there was no proper respondent in the district. The Court of Appeals, however, affirmed on the basis of an earlier ruling which explicitly did not reach the issue of whether the respondents must be within the District before the writ can issue. See *Jarrett v. Resor*, *supra* at 217. What *Jarrett* did decide—which is presumably the rule of law applied to petitioner here—was that a serviceman on leave status within a district is not “in custody” there for the purposes of 28 U.S.C. §2241. *Amicus* submits that both propositions are incorrect. The petitioner was “in custody” within the district of Arizona at the time he filed this application and the District Court had jurisdiction over the respondents.

We advance two premises for our argument. First, the Great Writ is “one of the basic safeguards of personal liberty,” and the “statutes governing its use must be generously construed if the great office of the writ is not to be impaired.” *Hirota v. MacArthur*, 338 U.S. 197, 201 (1949) (Mr. Justice Douglas, concurring). Accordingly its contemporary reach must accommodate the claims of a new class of petitioners like Sgt. Schlanger whose confinement is of a type not foreseen decades ago.

Second, for purposes of this type of uniquely federal litigation—a lawsuit brought in a District Court by a United States serviceman against United States officials, seeking to vindicate rights steeped in federal constitutional, statutory and regulatory law,—traditional, rigid concepts of the

territorial jurisdiction of a particular District Court are outmoded. Rather, in this type of suit the federal courts in effect constitute one nation-wide "district" where limitations on the choice of forum should be based on concepts of venue and the doctrine of *forum non conveniens*. Viewed from this perspective, territorial niceties are of diminished importance, this Court's opinion in *Ahrens v. Clark*, 335 U.S. 188 (1948) emerges as a venue decision, and this habeas corpus petition was properly brought in the District of Arizona.

## I.

**For the purposes of the habeas corpus statute, a serviceman is "in custody" at least in any district where he is assigned.**

It is undisputed that the petitioner was physically present within the District of Arizona when he filed his application. Thus, the very threshold requirement of jurisdiction, even under the traditional view expressed in *Ahrens*, has been met. The issue is whether his relationship to the military was such that he was "in custody" there for habeas corpus purposes. By relying on *Jarrett*, the Court of Appeals impliedly ruled that he was not and therefore did not make the further inquiry concerning whether an appropriate respondent was within the jurisdiction.

### A. *The changing concepts of "custody"*

In *Ahrens v. Clark*, *supra* this Court noted that,

. . . the view that the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or de-

tained within the territorial jurisdiction of the Court is supported by the language of the statute, by considerations of policy, and by the legislative history of the enactment. 335 U.S. at 192 (footnote omitted).

Whatever may be said about whether *Ahrens v. Clark* was correctly decided or about its reading of legislative history and policy considerations, see *Developments-Federal Habeas Corpus*, 83 HARV. L. REV. 1160-65, or, indeed, whether it has continuing vitality, *cf. Nelson v. George*, 26 L. Ed.2d 578, 582, n. 5 (1970), it is apparent that the judicial concept of custody has changed radically in the interim. When the existing habeas corpus statute was enacted, "custody" was virtually synonymous with actual physical constraint and confinement. The only remedy which could be sought was immediate release.

The changing concept of custody was carefully traced by District Judge Northrup in deciding a case quite similar to this one,

While it is true that custody is an essential element of a petition for habeas corpus relief, it is also true that the nature of the custody considered sufficient for habeas corpus has undergone significant conceptual change. At one time habeas corpus would lie only for those prisoners in actual confinement for the offense which was the subject of their petition. See, e.g. *Jones v. Cunningham*, 371 U.S. 236, 238, 83 S. Ct. 373, 9 L. Ed.2d 285 (1963); *McNally v. Hill*, 293 U.S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934). This notion of custody has expanded, however, and the writ is now looked on as a procedural device for subjecting restraints on liberty, although often short of actual physi-

cal confinement, to judicial scrutiny. It is used to test convictions before service of sentence for that offense has actually begun, *Peyton v. Rowe*, 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed. 426 (1968); to test a conviction while the petitioner is on parole, *Jones v. Cunningham*, supra; and test the validity of a conviction even after the prisoner's unconditional release, *Carafas v. LaVallee*, 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed.2d 554 (1968). This line of cases constitutes recognition of the fact that restraints on liberty short of physical confinement can be of such magnitude as to warrant the protection of the writ of habeas corpus, as "both the symbol and guardian of individual liberty." *Peyton v. Rowe*, 391 U.S. at 58, 88 S. Ct. at 1551. Habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. at 243, 83 S. Ct. at 377. *Donigian v. Laird*, 308 F. Supp. 449, 451 (D. Mary. 1969).

This modern concept of custody for habeas corpus purposes has been applied in a manner which would have been doctrinally impossible when *Ahrens* was decided. E.g., *Word v. North Carolina*, 406 F.2d 352 (4th Cir. 1969); *George v. Nelson*, 410 F.2d 1179 (9th Cir. 1969), *aff'd on other grounds*, 26 L. Ed.2d 578 (1970); *United States ex rel. Meadows v. State of New York*, 426 F.2d 1176 (2d Cir. 1970). For the petitioner challenging a criminal conviction, a flexible concept of custody has been utilized to render the Great Writ responsive to the needs of the situation.

### B. "Custody" by the military

In light of this judicial trend, it is not surprising that there has been a similar expansion of the availability of the writ to those who seek their release from the armed services. This Court, as well as numerous lower federal courts, have long recognized that one's mere membership in the military—active or inactive—is a sufficient state of custody to permit habeas corpus relief. As Mr. Justice Douglas stated in *Scaggs v. Larsen*, 90 S. Ct. 5 (1969):

The Great Writ was designed to protect every person from being detained, restrained or confined by any branch or agency of government. In these days, it serves no higher function than when . . . the military act[s] lawlessly.

See, *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946); *Oestereich v. Selective Service Local Board No. 11*, 393 U.S. 233 (1968); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Daoust v. Laird*, — F.2d —, 3 SSLR 3217 (D.C. Cir. 1970); *United States ex rel. Altieri v. Flint*, 54 F. Supp. 889 (D. Conn. 1943), *aff'd on opinion below*, 142 F.2d 62 (2d Cir. 1944); *United States ex rel. Barr v. Resor*, 309 F. Supp. 917 (D.C.D.C. 1970); *Donigian v. Laird*, *supra*; *Kepple v. Laird*, 3 SSLR 3148 (D.C.D.C. 1970); *United States ex rel. Lohmeyer v. Laird*, 3 SSLR 3072 (D. Mary. 1970). Indeed, even the Ninth Circuit has recently criticized a restrictive view of the custody requirement in military habeas corpus cases: "[t]he more contemporary view, however, is that actual physical restraint is not necessary and that one need only show a potential restraint upon his liberty to seek habeas corpus relief." *Johnson v. Laird*, — F.2d — (9th Cir., No. 25383, Nov. 24, 1970), slip opinion, p. 6.

The nature of military custody is far-reaching. Petitioner is subject to courts-martial jurisdiction, for service-connected offenses, throughout the world. *O'Callahan v. Parker*, 395 U.S. 258 (1969); 10 U.S.C. Sections 801 *et seq.* (Uniform Code of Military Justice). The Secretary of Defense and the Secretary of the Air Force have custodial control over the petitioner wherever he goes. *Daoust v. Laird, supra*; *Kepple v. Laird, supra*; *U. S. ex rel. Barr v. Resor, supra*.<sup>4</sup> Indeed, in this very case, the petitioner, while pursuing his studies at the University, was placed in a state of arrest upon the order of his then-commanding officer at Wright-Patterson Air Force Base in Ohio. A man subject to that type of restraint and control is "in custody." If a reservist seeking release from the Armed services is found to be in sufficient custody to seek habeas corpus relief, see, *e.g.*, *Hammond v. Lenfest, supra*, then *a fortiori*, one on active duty who seeks the same relief is entitled to the same remedy. The applicability in the military context of these modern notions of custody is and has been compelling:

In view of this line of cases broadening the concept of "custody" from an actual physical custody to a significant restraint on liberty, it is not surprising, therefore, that one subject to military orders or control has of late uniformly been found by the courts to be "in custody" as that term is used in section 2241 . . . and hence one authorized to seek habeas corpus relief. *U. S. ex rel. Lohmeyer v. Laird, supra*, at 3072.

Judge Northrup summed it up succinctly: " . . . to hold that retention in the Armed Forces is not a sufficient re-

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<sup>4</sup> These three cases involved petitioners who were all in Vietnam at the time their habeas corpus actions were commenced in the District of Columbia district court.

straint on liberty would be to ignore the realities of life." *Donigian v. Laird, supra* at 451.

### C. *The locus of custody*

While a serviceman is in custody wherever he may be, for the purposes of interpreting the habeas corpus statute and in the context of this case the Court need only hold that a petitioner is in custody in any district where he is assigned.

Apparently the petitioner was not due back at Moody Air Force Base, Georgia until August 29, 1969. It is unclear whether his status on August 27, the day he filed his petition, was one of active duty or leave. But it is clear that petitioner had been assigned to Arizona and was not unlawfully there. It was there that his commanding officers could direct and control him, as had occurred in 1968 when petitioner was dropped from the officers' program and placed in arrest.

Many courts have come to agree that a person who is confined or restrained in some way, can be in custody within the district where he is located even though his custodian is elsewhere. It is the actual or potential restraint upon the petitioner that places the locus of custody in the District where the effects of that restraint are felt.

*Donigian v. Laird, supra* reflects this concept. There, an Army lieutenant, unattached to any unit, was attending Johns Hopkins University at his own choice and expense. He sought a writ of habeas corpus seeking release from the Army following the wrongful denial of his application for discharge as a conscientious objector. The Government argued that Donigian could only sue in Indiana, the district in which the Army Personnel Operations Center was located. Judge Northrup rejected the contention, stating,

The Army seeks to exert control over Donigian in Maryland. It cannot then avoid the jurisdiction of this court merely because such control is exercised from a point located outside the state. . . . The overpowering factor in this inquiry is that the Army, regardless of where its command is physically located, is such a pervasive force that its effects are felt wherever those under its command are stationed. 306 F. Supp. at 453.

*Accord, United States ex rel. [redacted] v. Laird, supra.*

This approach has been taken by the federal courts ruling upon habeas corpus petitions filed by military personnel and holding that the courts sit wherever the petitioner is. *E.g., United States ex rel. [redacted] v. Laird*, 306 F. Supp. 926 (D. Mass. 1969); *United States ex rel. [redacted] v. Laird*, 304 F. Supp. 287 (W.D. Pa. 1969); *United States ex rel. [redacted] v. Laird*, 306 F. Supp. 1012 (D. Mass. 1969); *United States ex rel. [redacted] v. Laird*, 420 F.2d 962 (1st Cir. 1970).

Only two limitations on this broad principle—that the petitioner is confined in any district where it lawfully present—have emerged. First, that the petitioner cannot be AWOL, since then he can be sent out or be in custody anywhere. Thus, in *United States ex rel. Rudick v. Laird*, 412 F.2d 16 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969), where the petitioner, by his own choice, had not only brought suit in a district totally unrelated to his military service, but was in fact AWOL during most of the judicial proceedings, the Second Circuit observed,

" . . . it is doubtful whether a soldier who is absent without leave can be characterized as within the custody of any officer of the Armed Forces any more than

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it can be said that an escaped prisoner is in the custody of his jailer." 412 F.2d at 21.

Second, and similarly, the courts have also refused to entertain the application of a serviceman who has come into a district for transparent forum-shopping purposes. Compare *McKay v. Secretary of the Air Force*, 306 F. Supp. 1252 (D. Mass. 1969) (the petitioner had no "substantial relation" to the district) with, *Feliciano v. Laird*, 426 F.2d 424, 427, n. 4 (2 Cir. 1970) ("Whatever the mysteries of Army bookkeeping might ordain . . . the fact that Feliciano has been in this district and attached to Fort Wadsworth for over three months cannot be ignored"), and *Laxer v. Cushman*, *supra* at 924, n. 5 ("The fear of forum-shopping in a distant forum . . . is not present here. This district is the district in which petitioner has been subjected to military control for the past six months. . . ."). Sgt. Schlanger was assigned to and had been in the district for a substantial period of time when he filed this application. He was lawfully there, and his choice of that forum was certainly not made in bad faith.

The principle of the locus of custody which *amicus* urges this Court to accept with regard to members of the armed forces has been recognized in more traditional habeas corpus contexts. *E.g.*, *Word v. North Carolina*, *supra*; *George v. Nelson*, *supra*; *United States ex rel. Meadows v. State of New York*, *supra*. In those cases, prisoners confined in one jurisdiction sought to challenge convictions imposed by other jurisdictions which subjected the prisoners to future restraints on their liberty. The three decisions above all agreed that suit could be brought in the federal district of confinement, although the "custodian" of

the prisoner was elsewhere. The only substantial disagreement was over which of the two districts exercising concurrent jurisdiction would be the most appropriate forum for the application to be heard.

Decisions such as these, which refuse to allow strict territorial concepts to frustrate the purposes of the Great Writ, guide the way for resolution of this case. The petitioner was physically present in Arizona, his presence was pursuant to orders and in good faith, he was in the custody of the Air Force, which custody he questioned, and the effects of that custody were manifest upon him in Arizona. He was therefore "in custody" within that district and this Court should so hold.

## II.

**The Arizona District Court had jurisdiction over the respondents and was a proper forum for this action.**

The District Court held that there was no respondent subject to the personal jurisdiction or process of that Court. For many of the reasons advanced in Point I, *supra*, as well as those suggested *infra*, any District Court where a serviceman is in constructive custody has jurisdiction over his appropriate commanding officers. The only limits on the exercise of that jurisdiction should be those of convenience.

### **A. The Court had jurisdiction**

For most members of the Armed services who seek the aid of the federal courts to secure their release from the military, the kinds of problems raised here are non-existent.

The serviceman is stationed at a particular place, his commanding officer is at the same location and the court can usually proceed directly to a disposition of the merits of the application.

But a new class of military habeas corpus petitioners has come into existence. Like Sgt. Schlanger they may be servicemen on active duty assigned to temporary duty at a place in a different federal district from their commanding officer. Or they may be soldiers between duty stations, or reservists unattached to a particular command or to a command in a different state. As with prisoners seeking to challenge out-of-state convictions, the courts have attempted to construe the jurisdictional statutes so as to allow a resolution of the merits and not subject this new type of petitioner to a jurisdictional whipsaw.

One approach has been to find the commanding officer to be amenable to the court's jurisdiction because he exercises control or custody over the petitioner there. *E.g.*, *Donigian v. Laird, supra*. Custody is a two-way street; it is the linchpin of jurisdiction over both the petitioner and his commander. The authority of the commanding officer over the military petitioner is what renders the serviceman both "in custody" and in custody in the district where he is assigned. See Point I, *supra*. Simultaneously, that same authority of the commanding officer is what subjects him to the jurisdiction of that district. As Judge Northrup put it:

"The Army seeks to exert control over Donigian in Maryland. It cannot, then, avoid the jurisdiction of this Court merely because such control is exercised from a point located outside of this state." *Donigian v. Laird, supra*, at 453.

The concept that the respondent is present where his effects are manifested on the petitioner, has been employed in other military habeas corpus cases. *E.g. Laxer v. Cushman, supra*. The petitioner's commanding officer at Moody Air Force Base exercised actual and potential control over the petitioner in Arizona, just as the petitioner's previous commanding officer at Wright-Patterson Air Force Base, Ohio had, in fact, done. This impact on petitioner in the district of Arizona is sufficient to have given that court jurisdiction over Colonel Baker for the purposes of testing that official's right to continue to exercise custody of the petitioner. There is no constitutionally significant distinction between the power which Colonel Baker had over petitioner and the power of a state which files a detainer against a prisoner. Cf., *George v. Nelson, supra*; *United States ex rel. Meadows v. State of New York, supra*. The detainer is merely a physical embodiment of a claim to future custody over the person. If anything, Colonel Baker's potential for control over the petitioner was more immediate.

In certain respects, the jurisdictional principle recognized in these habeas corpus cases is similar to one which stems from this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and has fostered the new jurisdictional regimes of the "long-arm" statutes. In *International Shoe*, this Court held that the activities of a corporation can establish "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there." 326 U.S. at 320. Under modern concepts of *in personam* jurisdiction, the

fact that a defendant has had a significant impact in a state is sufficient to allow that state to exercise jurisdiction over him in connection with claims arising from that relationship. Conceptually, the continuing effects which Colonel Baker had over petitioner in the district of Arizona provide the same basis for jurisdiction. For habeas corpus purposes, Colonel Baker was a proper respondent amenable to the jurisdiction of the Arizona Court.

A second and similar approach to the question of jurisdiction over military commanders has been based upon a broad reading of 28 U.S.C. Section 1391(e). That section provides:

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity . . . may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or . . . (4) the plaintiff resides . . .

Service of papers may be made by certified mail "beyond the territorial limits" of the district in which the action is brought. Although the statute is denominated a venue provision, by allowing jurisdiction over federal officials who may be outside the district where the suit is filed and providing for valid service by mail, the statute has, realistically, extended the extraterritorial jurisdiction of the federal courts in suits against federal officers. In a sense this is a kind of long-arm statute which enables a District Court to reach across district lines and assert jurisdiction over a federal official whose official conduct has had some effect within the forum.

District Judge Gourley, in a case involving efforts to enjoin the activation of a Pennsylvania national guardsman, found that section 1391 (e) gave the District Court in Pennsylvania jurisdiction over Secretary of Defense Melvin Laird:

Although Section 1391 ostensibly is concerned with venue as distinguished from jurisdiction, Professor Moore concludes that the addition of subsection (e) was, in fact, intended to extend the extraterritorial jurisdiction of federal district courts where each of the named defendants are officers, employees, or agencies of the United States. 2 J. Moore, *Federal Practice*, paragraph 4.29, at 1210-11 (2 ed. 1967). This is confirmed by a reading of Sen. Rep. No. 1992, 87th Cong., 2d Sess., to accompany HR 1960, 2 U.S. Code Cong. and Adm. News (1962) p. 2784. I therefore conclude that the Court does have authority to exercise extraterritorial jurisdiction in the circumstances contemplated by Section 1391. *Metz v. United States*, *supra* at 209.

The District Court in *United States ex rel. Lohmeyer v. Laird*, similarly relied on section 1391 to find it had jurisdiction over a petitioner seeking release from the Army:

In the instant case the petitioner is a resident of Maryland. Hence, under section 1391 (e) (4) of Title 28 suit was properly brought in this district. Extraterritorial service of process was effected on the Honorable Stanley Resor, Secretary of the Army and on Major General K. G. Wickham, Adjutant General of the Army, by certified mail pursuant to the statutory authorization of section 1391(e) and personal service

was effected upon the Honorable Melvin Laird, Secretary of Defense, pursuant to the provisions of Rule 4(d), F.R.C.P., 28 U.S.C. This court concludes therefore that having jurisdiction over the subject matter, having venue jurisdiction and having jurisdiction over the respondents this case is properly before the court. (Footnote omitted) 3 SSLR at 3074.

*Accord, Silberberg v. Willis, supra.* Such interpretations of Section 1391 (e) are consonant with this Court's statement in *Ex Parte Endo*, 323 U.S. 283, 306 (1944): "But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner." The statute placed these respondents within reach of the Arizona Court's process.

Both of these approaches to the problems of the military petitioner recognize that in federal court litigation involving federal claims against United States officials, jurisdictional barriers based on concepts of territoriality must give way. Section 1391 (e) is an implicit recognition of such a concept. Especially when the availability of habeas corpus relief is at issue, strict concepts of territorial jurisdiction over the federal respondent are an anomaly in our highly mobile society. See, e.g., *Word v. North Carolina, supra*; *Harris v. Ciccone*, 417 F.2d 479 (8th Cir. 1969) (per Blackmun, C.J.) cert. denied, 397 U.S. 1078 (1970); *Holland v. Ciccone*, 386 F.2d 825 (8th Cir. 1967) cert. denied, 390 U.S. 1045 (1968). A contemporary perspective is particularly necessary where the federal defendants are military or defense officials who have the power to order servicemen to any one of the hundreds of military installations spread throughout our nation.

Moreover, there are no policy inhibitions which should prevent this Court from ruling that the respondents were subject to the jurisdiction of the Arizona District Court. First, such a ruling would present no problems of federalism or comity as between state and federal officials or courts. Compare *Word v. North Carolina*, *supra*; *United States ex rel. Meadows v. State of New York*, *supra*; *George v. Nelson*, *supra*. Here the parties, the custody, the claims and the interests are solely and completely federal. Second, the rule which *amicus* urges upon the Court does not allow forum-shopping. The primary forum would be the one where the petitioner was assigned. Third, the government is not disadvantaged because its attorneys are in every district. Most habeas corpus applications could probably be adjudicated on the administrative record, without need to transport witnesses or officials. The inconveniences to a federal prisoner which flow from the venue scheme of section 2255 were not found sufficient to overturn the arrangement. See *United States v. Hayman*, 342 U.S. 205 (1952). Conceivable inconvenience to the government should not be the basis for a narrow construction of section 2241. Finally, one would assume that the particular federal court would not meet difficulty in attempting to secure compliance by federal officials with its orders. See *Ex Parte Endo*, 323 U.S. 283 (1944), cf. *Feliciano v. Laird*, *supra* at 427, n. 4. At the very least, since service of the court's process can be effected beyond the limits of the district, the respondents could be directed to comply with the court's directives. Similarly there would be no problems of bringing the petitioner before the Court since he is already there. Compare *Ahrens v. Clark*, *supra*.

In sum, the habeas corpus statute can and must be construed to hold that the District Court had jurisdiction over the respondents in this case; such a holding is not foreclosed by considerations of policy or efficiency. Indeed, if the habeas corpus application was not properly brought in the District of Arizona, then it is questionable whether it could have been brought anywhere at all, see *Ahrens v. Clark*, *supra*; but see, e.g., *Word v. North Carolina*, *supra*,—a result in violation of Article I, section 9 of the Constitution.

#### **B. The forum was proper**

There is little that *amicus* can add to petitioner's discussion of these matters. It is apparent that the choice of forum was eminently made in good faith. The petitioner was there and the events which gave rise to his claim for release from the Air Force occurred there. The District of Arizona was the effective equivalent of the sentencing court. See *United States ex rel. Meadows v. State of New York*, *supra*; *Word v. North Carolina*, *supra*. The jurisdictional propositions suggested above provide ample control on forum-shopping.

## CONCLUSION

For the reasons set forth above, *amicus* submits that the decision below should be reversed and remanded for consideration of petitioner's claims.

Respectfully submitted,

MELVIN L. WULF

JOEL M. GORA

American Civil Liberties Union

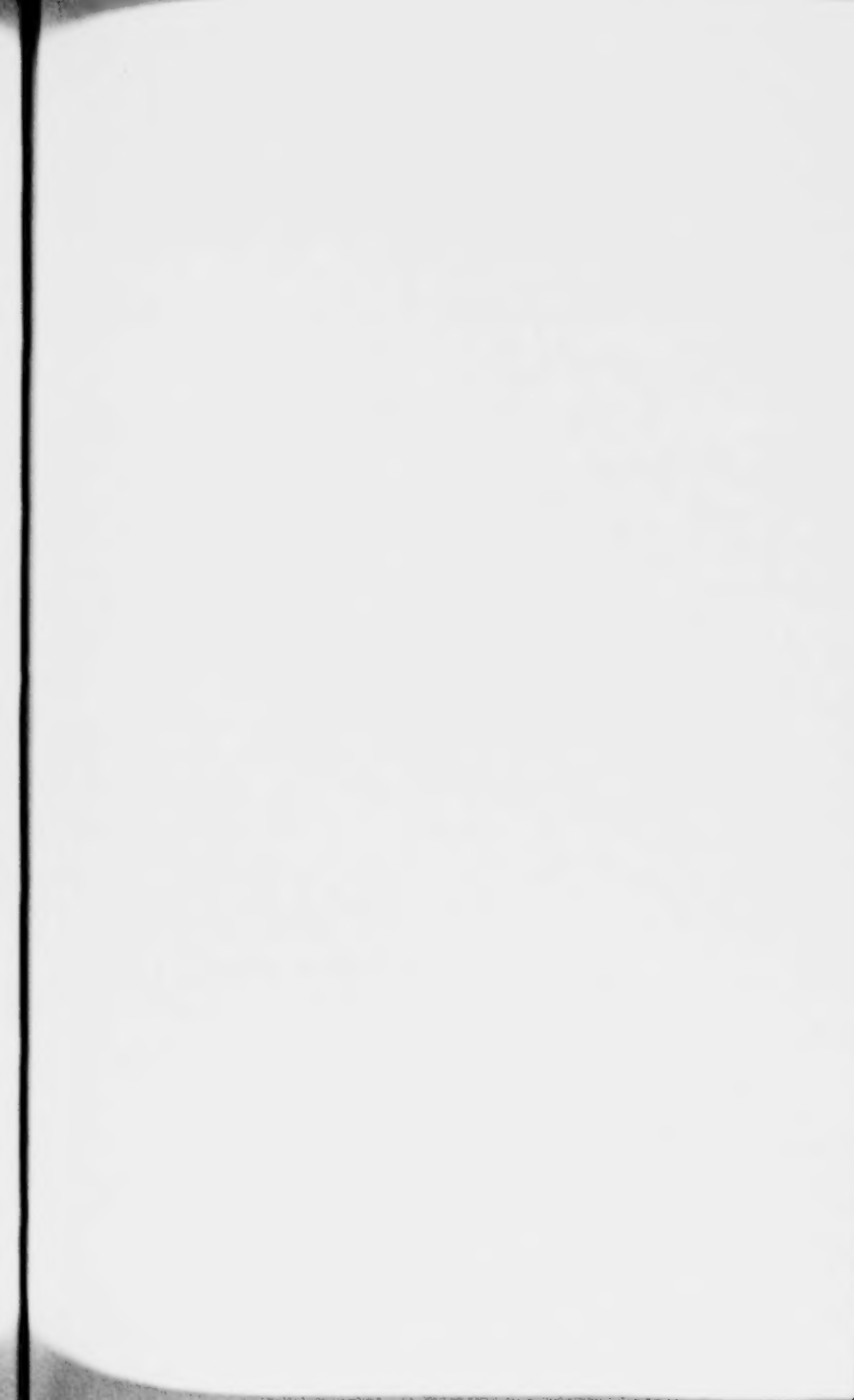
156 Fifth Avenue

New York, New York 10010

*Attorneys for Amicus Curiae\**

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\* Attorneys for *amicus curiae* wish to express their appreciation to Edwin J. Oppenheimer, Director of the New York Civil Liberties Union Selective Service and Military Law Panel, for his invaluable assistance in the preparation of this brief.



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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 5481

HERBERT PHILLIP SCHLANGER, PETITIONER

v.

ROBERT C. SEAMANS, JR., ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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## BRIEF FOR THE RESPONDENTS

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### OPINIONS BELOW

The order of the court of appeals (App. 68) is unreported. The order and opinion of the district court (App. 65) are also unreported.

### JURISDICTION

The judgment of the court of appeals (App. 68) was entered on May 20, 1970. A petition for rehearing (App. 80), with a request for rehearing *en banc*, was denied on June 17, 1970. On July 2, 1970, the petition for a writ of certiorari was filed; it was granted on October 19, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether habeas corpus jurisdiction can be invoked by a serviceman on active duty, seeking discharge from military service, in a judicial district other than one to which he has been assigned to fulfill his military obligation.

2. Whether petitioner's habeas corpus petition could be entertained in a jurisdiction where no respondent having custody and control over him is located.

## STATUTES INVOLVED

28 U.S.C. 2241 provides:

*Power to grant writ.*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress,

or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

\* \* \* \* \*

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination. [Supp. V.]

28 U.S.C. 2242 provides in part:

\* \* \* \* \*

If addressed to the Supreme Court, a justice thereof or a circuit judge [the application for a writ of habeas corpus] shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C. 2243 provides:

*Issuance of writ; return; hearing; decision.*

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing

the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

#### STATEMENT

This is a habeas corpus action brought in the United States District Court for the District of Arizona by a serviceman seeking discharge from active military service in the Air Force on the ground of an alleged breach

by the Air Force of his enlistment contract (App. 3). The district court, finding that it lacked jurisdiction to entertain the petition for a writ of habeas corpus, granted respondents' motion to dismiss (App. 65); the court of appeals affirmed (App. 68), and denied a petition for rehearing *en banc* (App. 80).

1. Petitioner enlisted in the Air Force for a four-year period in December, 1962 (App. 3). In 1965, he applied for the Airman Education and Commissioning Program, a two-phase program in which the Air Force pays for an airman's education at a civilian university and, then, upon completion of a subsequent period of military training, awards him a commission. AFR 53-20 (Sept. 3, 1965).<sup>1</sup> The academic phase of the program is under the supervision of the Air Force Institute of Technology, which is responsible for placing accepted airmen in selected civilian institutions and for their administrative and academic supervision while on campus (*ibid.*).<sup>2</sup> The military phase begins on satisfactory completion of the academic phase, and, after a twelve-week training period, results in a commission at Officer Training School (*ibid.*).

<sup>1</sup>"AFR" (Air Force Regulation) and "AFM" (Air Force Manual) refer to regulations of the Air Force; in light of the differing time periods involved in this case, the date of the applicable regulations is indicated in the references.

<sup>2</sup>Enlisted personnel participating in this program are automatically promoted to Staff Sergeant (pay grade E-5) during the program. AFM 50-5 (Dec. 1965), 3 AECP, para. 16. A person in pay grade E-5, with over three years' service (as petitioner was at the time he began participating in the program at the end of 1965), would earn \$250.50 per month in base pay in December 1965. 37 U.S.C. 203 (79 Stat. 545-546).

In October, 1965, petitioner was notified that he had been accepted in the program; orders were issued designating him an "officer trainee" and assigning him to Arizona State University (App. 4). On December 8, 1965, he was discharged and, on December 9, 1965, he reenlisted for a period of six years in order to meet the retainability requirement for participation in the program.<sup>3</sup>

Petitioner remained in this assignment at Arizona State University under the Airman Education and Commissioning Program until June 17, 1968. On that date, he was removed from the program by the Commandant, Air Force Institute of Technology (App. 13) and demoted to the pay grade (E-3) he had held immediately prior to being selected for the program, in accordance with AFR 39-30, para. 6a (App. 20);<sup>4</sup> he was informed that the basis for removal was his lack of officer potential, as demonstrated by his failure to attend scheduled classes (App. 13, 17, 32). Attendance of all scheduled classes is required by the Air

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<sup>3</sup> AFM 50-5 (July 1965), 3 AECP, para. 15, specifies:

Reenlistment Before Training:

a. On receipt of reassignment instructions from the AFIT, and just before the selectee departs for training, the unit commander will initiate action in accordance with para. 3b, AFR 39-14, to discharge him from his current enlistment and reenlist him for a 6-year period, notwithstanding the provisions of AFM 39-9. \* \* \*

<sup>4</sup> AFM 50-5 (July 1967), 3 AECP, para. 7(a) specifies that "[t]he Commandant, AFIT, is delegated the authority and responsibility for the prompt dismissal of any student who, in his opinion, reveals a lack of academic potential for the course undertaken or fails in any way to measure up to the high standards expected of Air Force officers."

Force regulations unless the serviceman obtains excused absences (App. 26).

Following petitioner's removal, he was ordered to withdraw immediately from the University (App. 13). On July 10, 1968, he was sent a transfer order to report to a new assignment at Moody Air Force Base, Georgia (App. 20). Petitioner complied with this order and, on September 4, 1968, applied for a discharge from active military service (App. 33). The Air Force denied his application on the grounds that "Airman Schlanger was properly eliminated from the AECP", and that, since he "received over two years of college education, at essentially no expense to himself, while drawing pay and allowances from the Air Force, the Air Force is entitled to expect him to comply with his December 1965 enlistment contract" (App. 39).<sup>5</sup>

Since petitioner, at the time of his removal from the program, needed only two more months of classes to obtain a degree from Arizona State University (App. 5), he asked his commanding officer at Moody Air Force Base for an opportunity to return to that university under "Operation Bootstrap," an Air Force program which, *inter alia*, authorizes airmen at

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<sup>5</sup> AFM 50-5 (July 1967), 3 AECP, para. 7c, provides that persons eliminated from the Airman Education and Commissioning Program must serve the remainder of their six-year enlistment:

c. *Disposition of Eliminees.* An individual dismissed from this program for reasons other than court-martial conviction will be reassigned to complete his 6-year enlistment in accordance with AFM 39-11.

(AFM 39-11 specifies general assignment procedures.)

their own request to attend a university to complete their college education (App. 59; AFM 213-1 (21 June 68), para. 4-1, *et seq.*).

Operation Bootstrap is separate and distinct from the Airman Education and Commissioning Program. Under Operation Bootstrap, an airman who can be released from his normal duties and who can complete the requirements for a baccalaureate degree within one year may be granted permission to attend an accredited college of his choice (AFM 213-1 (June 21, 1968), para. 4-1, *et seq.*); however, the airman must pay his own college expenses (para. 4-5b) and is responsible for all his travel expenses to and from the university (para. 4-5d). While attending college under Operation Bootstrap, the airman is placed in permissive temporary duty status ("permissive TDY"),<sup>6</sup> and consequently is free to terminate his participation in Operation Bootstrap and return to his permanent duty station at any time.<sup>7</sup>

Petitioner was granted permission to participate in Operation Bootstrap. On May 28, 1969, an order was promulgated by Headquarters, Moody Air Force Base, Georgia, assigning petitioner to permissive temporary duty at Tempe, Arizona, for the purpose of attending Arizona State University (App. 51). By its terms, the order "permitted [petitioner] to proceed

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<sup>6</sup> AFM 10-3 (June 1967), para. 2-33, defines "Permissive orders" as "[a]n order permitting an individual to travel as distinguished from an order directing him to travel."

<sup>7</sup> Acceptance for this program is conditioned on an agreement by the airman to extend his active duty commitment for a period three times the length of his temporary duty (AFM 213-1 (June 21, 1968), Table 4-1, Rule 5C).

from Moody AFB, GA. to Arizona State University, Tempe, AZ, effective on or about 4 June 1969 for approximately 70 days for the purpose of attending the University under Operation Bootstrap and then return to Moody AFB, GA." The travel authorized was to be "at no expense to the Government." Petitioner had also requested 15 days delay enroute in conjunction with his attendance under Operation Bootstrap, and this request was granted (App. 59); thus, the order also provided: "Airman is authorized 15 days leave, Leave Address: 2419 N. Saratoga, Tempe, AZ, 85281." <sup>8</sup>

Petitioner attended Arizona State University in the summer of 1969 and obtained his degree. Air Force records reflect petitioner's status during this period of time as the following (App. 46-47):

June 4 through June 14-----	11 days leave
June 15-----	TDY for purpose of travel <sup>9</sup>
June 16 through August 22----	TDY while attending school 68 days
August 23 through September 19 -----	28 days leave <sup>10</sup>

<sup>8</sup> A "leave address" is an address "at or through" which the Air Force can contact an airman on leave; he is under no obligation to remain physically present at that address (AFM 35-22 (Dec. 1964), para. 46b).

<sup>9</sup> Under AFM 213-1 (June 1968), para. 4-5d, the time spent in travelling to and from the university is charged to TDY instead of against the airman's leave time.

<sup>10</sup> Under the original order of May 28, 1969, petitioner was granted only 15 days leave; consequently, his last day of leave would have been August 26, and, on August 27—the day this suit was brought—he would have been in TDY status for purposes of his return travel to Moody Air Force Base. However, on August 27 he did not return to Moody Air Force Base, but

September 20.....	TDY for purpose of travel
September 21.....	Present for duty at Moody Air Force Base <sup>11</sup>

2. On August 27, 1969, after obtaining his undergraduate degree, petitioner commenced this action in the United States District Court for the District of Arizona, alleging that he was unlawfully detained in the Air Force and was entitled to be discharged on the ground that the Air Force, by removing him from the Airman Education and Commissioning Program, had violated the re-enlistment contract of December 9, 1965 (App. 3-9). Named as respondents were the Secretary of the Air Force, Col. Homer Baker, Commander, Moody Air Force Base, Georgia, and Col. Noel B. Reddrick, Commander Air Force ROTC Detachment 25, Arizona State University, Tempe, Arizona. In the terms of the petition (App. 3):

The Hon. Robert Seamans, Jr., Secretary of the AF and Colonel Homer Baker, Commander, Moody AFB, Georgia, are the persons who are at present unlawfully restraining applicant of his liberty \* \* \*. Col. Reddrick is the ROTC commander at ASU.

The district court, without issuing a show cause order, dismissed the petition *sua sponte* <sup>12</sup> on August 28, 1969

instead filed this suit in Arizona. By order of September 15, 1969, his 15 days leave time was retroactively extended to 45 days, so as to avoid carrying him in an absent without leave status from Moody Air Force Base during the period after August 27 (App. 50).

<sup>11</sup> Though petitioner did not in fact have to report back to Moody Air Force Base until September 27, 1969, he actually returned on September 21, 1969.

<sup>12</sup> Since the respondents had not been served with the petition, no appearances were made on their behalf.

(App. 40), and denied reconsideration on September 5, 1969. Petitioner, who returned to Moody Air Force Base after the district court's decision, appealed *pro se*. Moody Air Force Base granted him leave time, commencing December 9, 1969 (App. 47), so that he could personally argue his appeal before the Court of Appeals for the Ninth Circuit in San Francisco. On December 12, 1969, following petitioner's argument, the court of appeals issued an order setting aside without prejudice the district court's order and remanding the case to the district court for issuance of an order to show cause and further proceedings (App. 41). Respondents were also stayed from removing petitioner from the jurisdiction until completion of the proceedings in the district court (App. 43).

On remand, the district court issued the show cause order on January 8, 1970 (App. 42). Respondents appeared specially by counsel, and filed a motion to dismiss the petition for lack of personal jurisdiction over them (App. 44). This motion was granted on February 10, 1970 (App. 65), the court ruling that no person having custody of petitioner was within the district court's jurisdiction. The stay order barring removal of petitioner from the jurisdiction was continued pending appeal (App. 67).

The court of appeals on May 20, 1970, affirmed *per curiam* (App. 68) on the basis of its decision in *Jarrett v. Resor*, 426 F.2d 213 (C.A. 9). In *Jarrett*, the court had ruled that "[a] member of the Armed Forces who is voluntarily in a place other than an assigned post is not in custody in that place" (426 F.2d at 217) for purposes of habeas corpus jurisdiction.

A petition for rehearing was filed on June 3, 1970 (App. 69), and denied on June 17, 1970 (App. 80); however, the court of appeals granted petitioner an additional stay until July 2, 1970 (App. 81). On the expiration of that stay, which Mr. Justice Black refused to continue, petitioner was ordered to resume his regular duties at Moody Air Force Base, Georgia.<sup>13</sup>

#### SUMMARY OF ARGUMENT

##### I

Petitioner commenced this action in the United States District Court for the District of Arizona, while on leave from his assigned duty station at Moody Air Force Base, Georgia. Under 28 U.S.C. 2241, he was clearly "in custody" in the United States Air Force at the time he sought habeas corpus relief. He was not, however, being detained in the State of Arizona, but indeed had gone to that jurisdiction, at his own expense, only because he personally chose to complete his final college semester at Arizona State University under a special Air Force program called "Operation Bootstrap"; he voluntarily remained there on leave after receiving his degree, and it was then that the petition was filed.

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<sup>13</sup> Upon his return to Georgia, petitioner filed a petition for a writ of habeas corpus in the District Court for the Middle District of Georgia. On August 18, 1970, the district court dismissed the case on the ground that petitioner had failed to exhaust his administrative remedies. This case is now pending on appeal, C.A. 5, No. 30480. By order of November 5, 1970, the court of appeals deferred consideration of the appeal pending determination of this case.

This Court has long recognized that a district court may only inquire into the cause of restraints on liberty of those confined or restrained within its territorial jurisdiction. *Ahrens v. Clark*, 335 U.S. 188. The need for adherence to that principle in cases of this sort is amply demonstrated by the present proceedings. For, if a serviceman on active duty is permitted, while on leave, to bring a habeas corpus action in any judicial district he chooses, he can successfully obtain, *pendente lite*, release from his assigned military duties at his permanent base during the pendency of his case, with resulting unnecessary interference with military operations. Nor, as a matter of judicial policy, should a serviceman be permitted to shop for a judicial forum which he believes will be especially receptive to his habeas corpus claim. Petitioner at all pertinent times has had available a suitable forum for habeas corpus in Georgia, where he in fact filed a subsequent petition.

## II

Similarly, a serviceman such as petitioner should be required to comply with the requirement embodied in 28 U.S.C. 2243, that the writ of habeas corpus "be directed to the person having custody of the person detained." As construed by this Court in *Wales v. Whitney*, 114 U.S. 564, this provision requires that the person having immediate custody of the petitioner must be within the jurisdiction of the district court. 28 U.S.C. 1391(e), on which petitioner relies, does not eliminate this special habeas corpus requirement.

In the instant case, petitioner's immediate command-

er was located at Moody Air Force Base, Georgia; he was not in Arizona. The Secretary of the Air Force, also named as a respondent, had his official residence at Washington. Only Col. Reddrick, the ROTC commander at Arizona State University, was within the territorial limits of the Arizona court; however, he concededly had no custody or control over petitioner. Since both his custody and his custodian were in Georgia, petitioner should properly be remitted to his remedies there.

#### ARGUMENT

##### I

A SERVICEMAN ON ACTIVE MILITARY DUTY MUST SEEK HABEAS CORPUS RELIEF IN THE JUDICIAL DISTRICT WHERE HIS ASSIGNED DUTY STATION IS LOCATED, EVEN WHEN HE IS IN LEAVE STATUS

In general, the law of habeas corpus has evolved in cases brought by prisoners seeking release from imprisonment on criminal convictions. *E.g.*, *Fay v. Noia*, 372 U.S. 391. However, "besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones v. Cunningham*, 371 U.S. 236, 240. Consequently, it has long been recognized that this writ is the appropriate remedy for servicemen who claim to be unlawfully detained in the Armed Forces. *E.g.*, *In re Grimley*, 137 U.S. 147; *Eagles v. Samuels*, 329 U.S. 304; *Oestereich v. Selective Service Board*, 393 U.S.

233, 235.<sup>14</sup> Such persons are, as a practical matter, "in custody" as that term is used in 28 U.S.C. 2241, in the sense that they are subject to military orders and control which act as a restraint on their freedom of movement. See *Jones v. Cunningham*, *supra*, 371 U.S. at 240.

The question presented in the instant case does not concern the appropriateness of the remedy of habeas corpus for servicemen seeking discharge. That is agreed upon by the parties. Rather, what is in issue here is the proper jurisdiction in which such a petition for a writ of habeas corpus should be brought by a serviceman in active military service.

#### A

Congress has provided that "[w]rits of habeas corpus may be granted by \* \* \* the district courts \* \* \* within their respective jurisdictions." 28 U.S.C. 2241. In passing on the intended meaning of this language, this Court, in *Ahrens v. Clark*, 335 U.S. 188, ruled that habeas corpus jurisdiction of the district courts is limited "to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts." 335 U.S. at 190. It went on to point out that (335 U.S. at 190-191):

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<sup>14</sup> Similarly, see, e.g., *Hammond v. Lenfest*, 398 F. 2d 705 (C.A. 2); *United States ex rel. Brooks v. Clifford*, 409 F. 2d 700 (C.A. 4), rehearing denied, 412 F. 2d 1137; *Morgan v. Underwood*, 406 F. 2d 1253 (C.A. 5), certiorari denied *sub nom. Lizarraga v. Underwood*, 396 U.S. 944; *Brown v. McNamara*, 387 F. 2d 150, 152 (C.A. 3), certiorari denied *sub nom. Brown v. Clifford*, 390 U.S. 1005.

\* \* \* [T]he statutory scheme contemplates a procedure which may bring the prisoner before the court. \* \* \* It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose. These are matters of policy which counsel us to construe the jurisdictional provision of the statute in the conventional sense, even though in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages.

This interpretation is supported by the legislative history of the habeas corpus statute (335 U.S. at 191; but see 335 U.S. at 204-206 (Rutledge, J., dissenting)), and, as carefully noted in *Ahrens* (335 U.S. at 192-193), if the statutory scheme is to be altered so as to afford "district courts discretion in cases like this," the responsibility for making such a change lies with Congress, not with the courts. See also *Carbo v. United States*, 364 U.S. 611. Thus, subsequent decisions have continued to recognize the strictly jurisdictional nature of the requirement that a district court may issue a writ of habeas corpus only if the petitioner is detained within the boundaries of its district. *George v. Nelson*, 410 F. 2d 1179 (C.A. 9), affirmed on other grounds, 399 U.S. 224; *United States ex rel. Van Scoten v. Commonwealth of Pa.*, 404 F. 2d 767 (C.A. 3); *Webb v. Beto*, 362 F. 2d 105 (C.A. 5); *Whiting v. Chew*, 273 F. 2d 885 (C.A. 4); but see *Word v. North Carolina*, 406 F. 2d 352,

358-361 (C.A. 4). Compare *United States ex rel. Meadows v. State of New York*, 426 F.2d 1176 (C.A. 2).<sup>15</sup>

Significantly, Congress has been most reluctant to import into the statute any relaxation of this jurisdictional requirement for habeas corpus relief. Separate legislation (28 U.S.C. 2255<sup>16</sup>) has been enacted to provide a forum for a challenge to a criminal conviction in the sentencing court by a federal prisoner "in custody" elsewhere. But this Court emphasized, in *United States v. Hayman*, 342 U.S. 205, 220, that Section 2255 did not change the principle

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<sup>15</sup> In this regard, we note that in 1948 there was added in 28 U.S.C. 2242 the requirement that any habeas petition addressed to an appellate judge "state the reasons for not making application to the district court of the district in which the applicant is held." 62 Stat. 965. This language reinforces the principle that only the district court for the district of confinement has jurisdiction over a petition.

<sup>16</sup> 28 U.S.C. 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

\* \* \* \* \*

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

of *Ahrens* that a habeas corpus action "required the presence of the prisoner within the territorial jurisdiction of the District Court"; it simply establishes a new remedy that "is not a habeas corpus proceeding" (*ibid*). See also *Kaufman v. United States*, 394 U.S. 217. Congress did make a narrow exception to the jurisdictional limit recognized in *Ahrens* in a 1966 amendment which allows a state prisoner to seek habeas corpus in the district where he was sentenced, as well as in the district where he is confined, so long as both are within the same State. 28 U.S.C. (Supp. V) 2241 (d);<sup>17</sup> see also 28 U.S.C. (Supp. V) 2254. However, this Court has noted that the legislative history of this limited exception "suggests that Congress may have intended to endorse and preserve the territorial rule of *Ahrens* to the extent that it was not altered by [the 1966] amendments." *Nelson v. George*, 399 U.S. 224, 228 n.5; see also H. Rep. No. 1894, 89th Cong., 2d Sess., pp. 2, 4; S. Rep. No. 1502, 89th Cong., 2d Sess.

Consequently, in the absence of any legislative mandate to the contrary, there is no basis for any deviation from the strict requirement that a serviceman

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<sup>17</sup> 28 U.S.C. (Supp. V) 2241(d) provides:

Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application.\*\*\*

seeking to obtain release from active military service file his petition in the district where that service "confines" him. Ordinarily, each serviceman in the Armed Forces is assigned to a specific military post, and generally he is required to be present at his duty station each work-day. Only when he is on leave, or otherwise has permission to be away from his duty station, is he free to travel elsewhere. Plainly, without the territorial rule of *Ahrens*, a serviceman would be able properly to file a habeas corpus petition while in leave status in a judicial district other than the one in which his duty station is located.<sup>18</sup> His presence would most likely then be required in that district court so that the merits of his petition may be resolved. See 28 U.S.C. 2243. This would be so especially if, as here, the petition is prosecuted *pro se*. And this is true notwithstanding the fact that during the course of the proceedings the serviceman's leave, or his permission otherwise to be absent from his duty station, terminates, and his services at his duty station are needed again. The military would thus be faced with the alternatives of either transporting the applicant from his duty station to the appropriate judicial district each time his presence is required in court (assuming the court permits him to be ordered back to his duty

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<sup>18</sup> If the Court were to accept petitioner's suggestion—which we discuss *infra*, pp. 27-29—that there need not be a proper custodian within the jurisdiction of the district court that issued the writ, the serviceman could shop around for any forum he believes might be most receptive to his claim (see pp. 22-24, *infra*). Indeed, it is not clear that, under petitioner's approach, there would be any barrier to a serviceman's filing a petition—by mail or through counsel—in a foreign district even while he is on duty at his regular station.

station while his petition is pending), or simply extending his leave time to allow him to be absent from his duty station during the course of the habeas corpus proceedings.<sup>19</sup>

It must, of course, be assumed, until proved otherwise, that a person in military service is validly there and the military has the right to his services. See *e.g.*, *United States v. Chemical Foundation*, 272 U.S. 1, 14-15; *In re Grimley*, 137 U.S. 147, 150-152. However, if a serviceman is permitted to seek habeas corpus relief in judicial districts other than where his duty station is located, it will, at the very least, create a serious potential for widespread avoidance of duty assignments. The instant case highlights the point. Petitioner, through the filing of his original petition in Arizona instead of Georgia, where his duty station is located, has already succeeded in obtaining relief *pendente lite* from his military duty assignment for more than six months.<sup>20</sup> The undesirability of such im-

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<sup>19</sup> In the instant case petitioner was placed by the Air Force in leave status. Upon termination of the maximum amount of paid leave time allowable, he was placed in "excess leave" status, during which, under Air Force regulations, a member is not entitled to pay and allowances. See AFM 35-22 (Dec. 1964), Ch. 1, para. 6.

<sup>20</sup> The day after petitioner filed his habeas corpus petition, the Arizona district court improperly dismissed the action *ex parte* and without a hearing. Petitioner then returned, on September 21, 1969, to Moody Air Force Base and noted an appeal *pro se* from the district court's decision. He was granted permission by the Air Force to go to San Francisco in December 1969 to argue his case in the Ninth Circuit. That court determined that the *ex parte* action by the district court had been improper and, on December 12, 1969, remanded the case without prejudice to the district court. An order was entered

pairment of military operations by judicial proceedings has been noted by this Court in another context. In *Orloff v. Willoughby*, 35 U.S. 83, the Court refused to consider a doctor's challenge to his duty assignment as improper and discriminatory, observing (345 U.S. at 94-95), that—

Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat. By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. \* \* \* It is not difficult to see that the exercise of such jurisdiction as is heretofore urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities.

In *Ahrens*, this Court reasoned that the habeas corpus statute "contemplates a procedure which may bring the prisoner before the court. \* \* \* It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ." 335 U.S. at 190-191. Similarly, the same statutory scheme precludes such disruptions by reason of habeas corpus suits seeking discharge from military service.

by the Ninth Circuit Court of Appeals at that time enjoining the Air Force from removing petitioner from Arizona pending disposition of his case by the district court; subsequent stays were also issued during the course of the next round of appellate proceedings (App. 43, 67-31). Only after petitioner had lost on the second appeal, rehearing had been denied, and Mr. Justice Black had denied his petition to continue the stay order beyond July 2, 1970, could the Air Force require petitioner to return to his duty station at Moody Air Force Base, Georgia.

But it is not this disruptive force on military operations alone that requires adherence to the territorial rule of *Ahrens* in cases of this sort. There is also the sound judicial policy of discouraging a litigant's natural desire to "shop around" for the judicial forum that appears most favorably disposed to the position he has taken. Such forum shopping would inevitably result if petitioner were to prevail here, for the jurisdictional rule he urges would permit a serviceman on active duty, while on leave from his assigned duty station, to file his habeas corpus petition in any judicial district he chooses on the theory that military "custody" can be deemed to exist wherever "its effects are felt" rather than where the immediate authority is actually exercised (Pet. Br. 10-11). Cf. *McKay v. Secretary of United States Air Force*, 306 F. Supp. 1252 (D. Mass.) ; *McKay v. Seamans*, D. D.C., No. H.C.-255-69, decided, December 4, 1969, affirmed, C.A.D.C. No. 23736, decided, December 4, 1969 ; *United States ex rel Olsen v. Laird*, M.D. N.C., No. C-165-8-70, decided, December 2, 1970.

It is difficult to perceive a rational basis for such a novel proposition. The traditional concepts of habeas corpus jurisdiction do not deprive a serviceman on active duty of a judicial forum in which to assert his claim,<sup>21</sup> or impose on him any substantial burdens

<sup>21</sup> Even where a serviceman is stationed overseas, he is, for purposes of habeas corpus jurisdiction, considered to be "in custody" within the District of Columbia, and thus he may properly maintain a suit there seeking discharge from active military service so long as there is a proper respondent custodian within the reach of the court's process. See, e.g., *Wilson v. Girard*, 354 U.S. 524 ; *Daoust v. Laird*, D.C. C.A., No. 23944, decided September 3, 1970 ; *United States ex rel. Barr v. Resor*, 309

that he is able to avoid by bringing his action elsewhere. The situation is not comparable to that of a prisoner who finds himself in custody in a jurisdiction different from that in which the court imposing sentence is located (*supra*, pp. 17-18). Plainly, if, on the facts of this case, petitioner had waited one more day and reported to Moody Air Force Base on August 28, 1969, as ordered, he could have as easily commenced habeas corpus proceedings in the United States District Court for the Middle District of Georgia—the jurisdiction in which all his records were kept and his commanding officer was located—just as he later decided to do after returning to his regular duty station in July 1970 (*supra* n. 13).

Thus, even if the balance of convenience to the serviceman, the military and the courts were the basis upon which this case should be decided, there is nothing in the circumstances of this case—or in any other case that has been suggested—that would warrant the fashioning of a rule permitting habeas corpus to be sought in any district other than that of the petitioner's military station. In any event, any such argument would have to be directed to Congress and not to the courts, since, as we noted at the outset, the restriction of habeas corpus to the district of confinement is

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F. Supp. 917 (D. D.C.); *Kepple v. Laird*, D. D.C., H.C. No. 14-70, decided April 1, 1970. This question was specifically reserved in *Ahrens*, 335 U.S. at 192, n. 4.

Nor, in our view, do the traditional concepts of habeas corpus jurisdiction need to deprive a serviceman on active duty of an opportunity to maintain a suit for discharge in the unusual situation, not presented here, where his assigned duty station is located in a jurisdiction other than the one where his immediate commander is stationed. See *infra*, n. 28.

a jurisdictional requirement arising directly from the statute.

Those courts of appeals which have considered the question have consistently recognized the continuing validity of the *Ahrens* jurisdictional principle in the field of military habeas corpus. Thus, in *United States ex rel. Rudick v. Laird*, 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918, a suit filed by a serviceman in New York while on leave between two duty assignments in California, the Second Circuit held that the New York district court was without jurisdiction since petitioner was not "in custody" there, but was in New York on his own volition. Similarly, in *Jarrett v. Resor*, 426 F. 2d 213 (C.A. 9), followed by the court of appeals below, a serviceman whose duty station was located at Fort Knox, Kentucky, was not permitted to commence habeas corpus proceedings while on leave in the Northern District of California; as the court there stated (426 F. 2d at 217): "A member of the Armed Forces who is voluntarily in a place other than an assigned post is not in custody in that place." And see *Duncan v. State of Maine*, 295 F. 2d 528, 530 (C.A. 1), certiorari denied, 368 U.S. 998; *Ginyard v. Clemmer*, 357 F. 2d 291, 292-293 (C.A.D.C.); *Wurster v. Perlin*, 303 F. Supp. 480 (D. P.R.); *Morales Crespo v. Perlin*, 309 F. Supp. 203 (D. P.R.); *Weber v. Clifford*, 289 F. Supp. 960 (D. Md.); *Orloff v. Lovett*, 101 F. Supp. 750 (D. D.C.).<sup>22</sup> In addition, *Hammond v. Lenfest*, 398

<sup>22</sup> Cf. *Laxer v. Cushman*, 300 F. Supp. 920, 924 n. 5 (D. Mass.). Contra: *United States ex rel. Lohmeyer v. Laird*, 3 SSLR 3072 (D. Md.).

F. 2d 705 (C.A. 2), a suit brought by a serviceman not on active duty, but in the Naval reserves, reaches a similar conclusion. The judicial district there held to have habeas corpus jurisdiction was the one in which his assigned reserve unit to which he reported monthly was located (398 F. 2d at 707). And see *McKay v. Secretary of United States Air Force*, 306 F. Supp. 1252 (D. Mass.); *Silberberg v. Willis*, 306 F. Supp. 1013, 1020 (D. Mass.), reversed on other grounds, 420 F. 2d 662 (C.A. 1); *Nason v. Secretary of Army*, 304 F. Supp. 422 (D. Mass.).<sup>23</sup>

### B.

We turn, then, to the question whether the jurisdictional requirement has been met in the instant case. At the time petitioner filed his habeas corpus petition in Arizona he was concededly (App. 58, 59) on leave from his permanent duty station at Moody Air Force Base, Georgia. His status was thus markedly different from what it would have been had he not been withdrawn from the Airman Education

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<sup>23</sup> The case of *Donigian v. Laird*, 308 F. Supp. 449 (D. Md.), presents a unique situation, wholly distinguishable from the instant case on its facts. There the petitioner, a reserve officer, had been "placed on inactive status and deferred in order that he might pursue graduate study in chemistry at Johns Hopkins University" (308 F. Supp. at 450). At the time he filed his habeas corpus petition he was not on leave from a permanent duty station; indeed, unlike petitioner here, Donigian was "attached to no unit" and had no "ascertainable duty stations" (308 F. Supp. at 453). Even there, however, it is instructive to note that the court, in sustaining jurisdiction emphasized that "the custody of which [Donigian] complains relates very definitely to this district" (308 F. Supp. at 453). And see *infra* n. 28.

and Commissioning Program. As earlier indicated (*supra*, pp. 5, 6-7), by the terms of that program, the Air Force Institute of Technology assigns an airman to a participating civilian institution and "[a]ttendance at scheduled classes is the direct counterpart of reporting to duty or to a military formation under normal duty conditions" (App. 26). Accordingly, petitioner, before being removed from AECP in 1968, was admittedly stationed at Arizona State University in Arizona.

When, however, he was withdrawn from that program and reassigned to Moody Air Force Base, his only duty station was in Georgia. His return to the Arizona campus almost a year later under Operation Bootstrap, though with the Air Force's permission, was of his own choosing and at his own expense, and in no sense could he be considered stationed there. The permissive TDY (temporary duty) status he was given merely relieved him of duty assignments in Georgia while he was completing the final semester of classes. It was, in essence, the equivalent of an extended leave; petitioner was not required to report to anyone in Arizona, he was not there to perform any military duties, nor was he under the supervision of any Air Force personnel who might have been stationed there.<sup>24</sup> In any event, once he received his degree, the sole purpose for his sojourn in Arizona had been realized and he was then in no different posture than

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<sup>24</sup> Petitioner was thus free to miss scheduled classes under the Operation Bootstrap program, something he was not permitted to do at the time he was attending the university under Air Force supervision (*supra* p. 6).

any other serviceman on leave from Moody Air Force Base; it was at this time that the petition was filed. Plainly, as petitioner states (Pet. Br. 11), "he was lawfully present in Arizona"; but just as clearly, he was not then "in custody" within that judicial district for purposes of habeas corpus jurisdiction.

## II

THE DISTRICT COURT PROPERLY DECLINED TO ENTERTAIN PETITIONER'S APPLICATION BECAUSE HE HAD NO COMMANDING OFFICER WITHIN THE DISTRICT

*A. The Arizona court lacks jurisdiction under 28 U.S.C. 2243.*

Even assuming *arguendo* that there is in this case jurisdiction to the extent that the petitioner is "in custody" within the territorial limits of the Arizona district court, there is another reason why the action must fail. Section 2243 of Title 28 specifies that the writ of habeas corpus "shall be directed to the person having custody of the person detained." This statutory language, as it originally appeared in the Act of February 5, 1867, ch. 28, Sec. 1, 14 Stat. 385, was interpreted by this Court as requiring that a person having immediate custody over the petitioner must be subject to the jurisdiction of the court issuing the writ. *Wales v. Whitney*, 114 U.S. 564, 574. And the Court has more recently recognized this prerequisite for habeas corpus jurisdiction. See *Ex Parte Endo*, 323 U.S. 283, 306-307; *Jones v. Cunningham*, 371 U.S. 236, 244. And see, *Ahrens v. Clark*, 335 U.S. at 198-205 (Rutledge, J. dissenting).

Applying this principle, courts of appeals faced with the question whether a serviceman on active duty can maintain habeas corpus proceedings in a particular judicial district have correctly looked to see, *inter alia*, if a proper respondent custodian is within reach of the court's process. See, *e.g.*, *United States ex rel. Rudick v. United States*, 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918; *United States ex rel. Keefe v. Dulles*, 222 F. 2d 390 (C.A.D.C.), certiorari denied, 348 U.S. 952. Such an examination in the instant case reveals that this jurisdictional requirement cannot be met.

The respondents to this suit are (1) the Secretary of the Air Force, (2) Colonel Homer Baker, the commander of Moody Air Force Base, Georgia, and (3) Colonel Noel Reddrick, the commander of the Reserve Officer Training Corps at Arizona State University. Of the three, Col. Reddrick was the only one physically present within the jurisdiction of the Arizona district court at the time the action was commenced. However, as petitioner readily concedes (App. 3), Col. Reddrick's command authority was limited to the ROTC program at the university. He had no custody or control over petitioner by virtue of the fact that petitioner chose to attend classes on the Arizona State campus under Operation Bootstrap (*supra*, p. 10). Petitioner was not in the ROTC, at Arizona State, or elsewhere. See, *e.g.*, *Donigian v. Laird*, 308 F. Supp. 449, 452 (D. Md.). Indeed, even assuming the contrary, it is clear that any custody or control Col. Reddrick might have had would have terminated at the

time petitioner received his degree and would not have extended to the subsequent leave time from Moody Air Force Base, on the last day of which this petition was filed.

The person who did have custody and control over petitioner was Col. Baker, his commanding officer in Georgia. But he was neither a resident of the judicial district in question nor amenable to its process. While it was Col. Baker who granted petitioner's request for permissive TDY (at a time when petitioner was in Georgia), who had authority to recall petitioner in the event of a national emergency, and who was the commander to whom petitioner was required to report on his return to Moody Air Force Base, Col. Baker was not a person over whom the Arizona court had jurisdiction so as to order him to carry out its mandate.

The same can be said for the Secretary of the Air Force, whose official residence is at Air Force headquarters in Washington. See, *e.g.*, *Donigian v. Laird*, 308 F. Supp. 449, 452 (D. Md.). If he could be sued in Arizona for purposes of the present action, it would, as expressed in a related context in *United States ex rel Rudick v. Laird, supra*, 412 F. 2d at 21, suggest the following anomaly:

\* \* \* a soldier seeking habeas corpus relief would not be required to bring suit against his commanding officer where he is stationed and presumably where his pertinent files are located. Instead, he would be entitled to sue the Secretary of the [Air Force] \* \* \* in any forum of his own choosing anywhere in the United States.

B. 28 U.S.C. 1391(e) does not affect the jurisdictional requirements for habeas corpus.

Petitioner and *amicus* argue that the Secretary and Col. Baker could properly be named as respondents in the Arizona district court (assuming custody there) under the 1962 amendment adding 28 U.S.C. 1391(e), P.L. 87-748 (76 Stat. 744), which provides that

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be by certified mail beyond the territorial limits of the district in which the action is brought.

1. Even if Section 1391(e) applied to habeas corpus proceedings—and we shall contend that it does not—it would not permit petitioner to sue in Arizona on the facts of this case. As indicated above (*supra* pp. 28-29), there is not a defendant with custody and control over petitioner who resides in Arizona; nor is this an action involving real property situated in that state. Since the cause of action is not one for breach

of contract—although petitioner asserts as a ground for discharge that the Air Force violated his re-enlistment contract of December 9, 1965—but rather is an habeas corpus action charging unlawful detention, it arose not in Arizona, but in Georgia where petitioner was in fact being “detained” at the time he commenced his suit (see *supra* pp. 25–27). And, finally, petitioner’s place of residence cannot properly be considered to be in Arizona.<sup>25</sup> When he went to that jurisdiction under Operation Bootstrap, it was solely to attend his final semester of classes at Arizona State University, from June 16 through August 22, 1969 (*supra* p. 9). Thereafter, as earlier indicated, he remained in Arizona only because it was there that he chose to spend his last five days of leave from his permanent duty station at Moody Air Force Base. His place of residence throughout this period, however, was in Georgia, the state to which he was required to return after receiving his college degree and in which he was committed to remain during the last 21½ years, or so, of his military service, or until ordered to a new duty station.<sup>26</sup>

2. In any event, Section 1391(e) does not affect the jurisdictional requirements for habeas corpus. It was enacted expressly “to make it possible to bring actions against Government officials and agencies in

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<sup>25</sup> On all petitioner’s Air Force personnel records, his “Home of Record” is at 30 Dongan Place, New York, New York.

<sup>26</sup> We have been advised that petitioner has recently received orders to report to a new duty station in Iceland shortly after this Court hears oral argument in this case. He still has over one year to serve.

U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." H. Rep. No. 536, 87th Cong., 1st Sess., p. 1; S. Rep. No. 1992, 87th Cong., 2d Sess., p. 2; and see 107 Cong. Rec. 12157; 108 Cong. Rec. 18783, 20093-20094. But there never has been any such limitation on habeas corpus actions, which can be brought (even by servicemen on active duty) against the appropriate custodians in federal district courts throughout the country; thus, there was never any need for Section 1391(e) in habeas corpus proceedings, and there is nothing in the legislative history to suggest that habeas corpus proceedings were ever contemplated as being within the ambit of this amendment. Indeed, the explicit reference in the 1962 legislation to the Federal Rules of Civil Procedure—which at that time expressly excluded habeas corpus proceedings from their reach (Rule 81(a)(2), Fed. R. Civ. P.)—reinforces this reading. See *Harris v. Nelson*, 394 U.S. 286, 294.<sup>27</sup>

As this Court observed in *Harris v. Nelson*, *supra*, the fact that habeas corpus proceedings are for some purposes characterized as "civil" does not automatically mean that the procedures applicable to them are identical with those provided for conventional civil

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<sup>27</sup> As this Court noted in *Harris v. Nelson* (394 U.S. at 293 n. 3), Rule 81(a)(2) has since been amended, effective July 1, 1968, to read, "These rules [the Federal Rules of Civil Procedure] are applicable to proceedings for \* \* \* habeas corpus \* \* \* to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Obviously, this action did not amount to an amendment of Section 1391(e).

actions. "[T]he [civil] label is gross and inexact. Essentially, the proceeding is unique. Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense." 394 U.S. at 293-294 (footnote omitted). In light of the fact that the habeas corpus statutes create—as we have pointed out—a unique requirement for personal jurisdiction over a custodian, it should not lightly be inferred that a general venue statute, focused on a different problem altogether, inadvertently modifies that specific requirement. See *United States ex rel. Rudick v. Laird*, *supra*, 412 F.2d at 20.

To be sure, there may be situations where a rigid requirement that both custody and custodian be in the same district would present difficulties in applying the habeas corpus remedy. But in those situations a suitable remedy can be fashioned *within* the habeas corpus system, in accordance with the principle recognized in *Harris v. Nelson* that "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." 394 U.S. at 291.<sup>28</sup> But that does not

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<sup>28</sup> Such a situation would be presented by an occasional serviceman who, unlike petitioner here, is *stationed* at an isolated location in a district where there is no commanding officer; such a serviceman might well be allowed—in the exercise of the flexibility inherent in the statutory scheme—to file his habeas corpus petition in the district of his "custody," *i.e.*, where he is stationed, with extraterritorial jurisdiction over the person of his immediate commanding officer. Otherwise there would be no district in which a petition could be filed.

Similar considerations led to the result in *Donigian v. Laird*, *supra*, involving a reserve officer, located in the district of Maryland, who had no custodian in any real sense other than the

mean that the well established principles of habeas corpus jurisdiction should be abandoned wholesale, which would be the result of a blind application of the literal language of Section 1391(e). As we have contended, no exception to the established principles of habeas corpus jurisdiction is necessary to provide a fair remedy in petitioner's situation, since both his custody and his custodian were at the pertinent time in Georgia, where he in fact now has a separate habeas corpus action pending (see n. 13, *supra*). He should be remitted to his remedies in that district, where both of the prerequisites lacking in the present case are met.

C. *In any event, the action should be transferred under 28 U.S.C. 1404(a).*

Even if the Court should find that the Arizona district court does have jurisdiction to entertain the instant petition, it seems obvious that the case should be transferred to the Middle District of Georgia under 28 U.S.C. 1404(a), and the direction for remand should be without prejudice to the filing of a motion under that provision. Cf. *United States ex rel. Meadows v. State of New York*, 426 F. 2d 1176, 1183-1184 n.

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commander of the personnel center for reservists in Indiana. In this admittedly "highly unusual situation" (308 F. Supp. at 453)—where there was no concurrence of custody and custodian in any district in the United States—the court allowed a petition to be filed in the district where the reserve officer was at the time actually attending graduate school, with the Army's permission, and where at least part of the military's processing of his discharge application had taken place. See n. 23, *supra*. We disagree, of course, with the *Donigian* court's reliance upon Section 1391(e), and with the similar lower court decisions in two other districts upon which petitioner relies (Pet. Br. 17).

9 (C.A. 2). As we have pointed out, the balance of convenience to the serviceman, the military and the courts amply demonstrates the propriety of an application of the *forum non conveniens* principle in the circumstances of this case.

#### CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

ERWIN N. GRISWOLD,  
*Solicitor General.*

L. PATRICK GRAY, III,  
*Assistant Attorney General.*

WM. BRADFORD REYNOLDS,  
*Assistant to the Solicitor General.*

MORTON HOLLANDER,  
ROBERT E. KOPP,  
*Attorneys.*

FEBRUARY 1971.

No. 5481

Petition for rehearing not  
granted.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

### SCHLANGER *v.* SEAMANS, SECRETARY OF THE AIR FORCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 5481. Argued February 22, 1971—Decided March 23, 1971

The District Court for the District of Arizona did not have jurisdiction to entertain a habeas corpus application by an Air Force enlisted man in Arizona on temporary duty orders, as no custodian, neither the commanding officer at Moody Air Force Base in Georgia nor anyone in the chain of command, was a resident of Arizona. Pp. 2-5.

Affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. HARLAN, J., concurred in the result. STEWART, J., dissented.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 5481.—OCTOBER TERM, 1970

Herbert Phillip Schlanger,	} On Writ of Certiorari to the	
Petitioner,		United States Court of
v.		Appeals for the Ninth
Robert C. Seamans, Jr.,		Circuit.
Secretary of the Air		
Force, et al.		

[March 23, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The sole question in this case is whether the District Court of Arizona had jurisdiction to entertain on the merits petitioner's application for a writ of habeas corpus. He is an enlisted man who was accepted in the Airman's Education and Commissioning Program, an officer training project, and was assigned to Wright-Patterson AFB, Ohio, "with duty at Arizona State University" for training. While studying in Arizona and before completion of the course, he was removed from the program, allegedly for engaging in civil rights activities on the campus.

While he was seeking administrative relief through command channels, he was reassigned to Moody AFB, Georgia to complete the remainder of his six-year enlistment in a noncommissioned status. After exhausting those remedies he was given permissive temporary duty to attend Arizona State for study, this time by his

superiors at Moody AFB under a different program called Operation Bootstrap, and at his own expense.<sup>1</sup>

Thereafter<sup>2</sup> he filed his application for habeas corpus in Arizona alleging that his enlistment contract had been breached and that he was being detained unlawfully. The District Court denied the application. The Court of Appeals affirmed on *Jarrett v. Resor*, 426 F. 2d 213. The case is here on a petition for certiorari which we granted. 400 U. S. 865.

The respondents to this suit are the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of the AF ROTC program on the Arizona State campus. The last respondent was the only one of the three present in Arizona and he had no control over petitioner who concededly was not in his chain of command, since petitioner was not in the AF ROTC program, but in Operation Bootstrap. The commanding officer at Moody AFB in Georgia did have custody and control over petitioner; but he was neither a resident of the Arizona judicial district nor amenable to its process.

It is true of course that the commanding officer at Moody AFB exerted control over petitioner in the sense that his arm was long and petitioner was effectively subject to his orders and directions. There are cases which

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<sup>1</sup> Headquarters at Moody AFB assigned petitioner to temporary duty at Arizona State University. By its terms, the order "permitted [petitioner] to proceed from Moody AFB, Georgia to Arizona State University, Tempe, AZ, effective on or about 4 June 1969 for approximately 70 days for the purpose of attending the University under Operation Bootstrap and then return to Moody AFB, Georgia." The travel authorized was to be "at no expense to the Government."

Petitioner attended Arizona State in the summer of 1969 and obtained his degree.

<sup>2</sup> This action was started shortly after petitioner had obtained his degree at Arizona State and while he was still in Arizona.

suggest that such control to establish custody may be adequate for habeas corpus jurisdiction even though the control is exercised from a point located outside the State, as long as the petitioner is in the district or the State. *Donigian v. Laird*, 308 F. Supp. 449. For reasons to be stated, we do not reach that question.

The procedure governing issuance of the writ is provided by statute. The federal courts may grant the writ "within their respective jurisdictions." 28 U. S. C. § 2241 (a). While the Act speaks of "a prisoner" (28 U. S. C. § 2241 (c)), the term has been liberally construed to include members of the armed services who have been unlawfully detained, restrained, or confined. *Eagles v. Samuels*, 329 U. S. 304, 312. The Act extends to those "in custody under or by color of the authority of the United States." 28 U. S. C. § 2241 (c)(1). The question in the instant case is whether any custodian, or one in the chain of command, as well as the person detained, must be in the territorial jurisdiction of the District Court.

In *Ahrens v. Clark*, 335 U. S. 188, we held that it was not sufficient if the custodian alone be found in the jurisdiction where the persons detained were outside the jurisdiction<sup>3</sup> and that jurisdiction over the respondent was

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<sup>3</sup> Shortly thereafter Congress provided that a prisoner, no matter where held, could by motion invoke the jurisdiction of the sentencing court and be released on a showing that the sentence was unlawful. 28 U. S. C. § 2255. See *United States v. Hayman*, 342 U. S. 205, 220; *Kaufman v. United States*, 394 U. S. 217.

Later Congress made an exception to the jurisdictional requirement noted in *Ahrens* by allowing a state prisoner to seek habeas corpus in the district where he was sentenced, as well as in the district where he is confined, provided both are within the same State. 28 U. S. C. § 2241 (d) (Supp. V). As respects that amendment the Court said in *Nelson v. George*, 399 U. S. 224, 228, n. 5:

"The legislative history of the 1966 amendments to 28 U. S. C. § 2241 (d) (1964 ed., Supp. V) suggests that Congress may have intended to endorse and preserve the territorial rule of *Ahrens* to

territorial.<sup>4</sup> The dissent in that case thought that the critical element was not where the applicant was confined but where the custodian was located; that if the custodian were in the territorial jurisdiction of the District Court, then effective relief could be effected.

Whichever view is taken of the problem in *Ahrens v. Clark*, the case is of little help here. For while petitioner is within the territorial jurisdiction of the District Court, the custodian—the Commander of Moody AFB—is not. In other words, even under the minority view in *Ahrens v. Clark*, the District Court in Arizona has no custodian within its reach against whom its writ can be spent. Hence even if we assume that petitioner is “in custody”<sup>5</sup> in Arizona in the sense that he is subject to

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the extent that it was not altered by those amendments. See H. R. Rep. No. 1894, 89th Cong., 2d Sess., 1-2 (1966). See also S. Rep. No. 1502, 89th Cong., 2d Sess. (1966).”

<sup>4</sup> Although by 28 U. S. C. § 1391 (e) Congress has provided for nationwide service of process in a “civil action in which each defendant is an officer or employee of the United States,” the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia. See H. R. Rep. No. 536, 87th Cong., 1st Sess., 1; S. Rep. No. 1992, 87th Cong., 2d Sess., 2. Though habeas corpus is technically “civil,” it is not automatically subject to all the rules governing ordinary civil actions. See *Harris v. Nelson*, 354 U. S. 286.

<sup>5</sup> The concept of “custody” has been an evolving one as Judge Northrop shows in *Donigian v. Laird*, 308 F. Supp. 449, 451. And see *Peyton v. Rowe*, 391 U. S. 54, 64-66. In *Jones v. Cunningham*, 371 U. S. 236, 238, 240, 243, we said:

“While limiting its availability to those ‘in custody,’ the statute does not attempt to mark the boundaries of ‘custody’ nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. . . .

“History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man’s liberty, restraints not shared by the public generally, which have been

military orders and control which act as a restraint on his freedom of movement (*Jones v. Cunningham*, 371 U. S. 236, 240), the absence of his custodian is fatal to the jurisdiction of the Arizona District Court. Cf. *Rudick v. Laird*, 412 F. 2d 16, 21.

Had petitioner, at the time of the filing of the petition, been under the command of the Air Force officer assigned as liaison officer at Arizona State to supervise the Education and Commissioning Program, we would have a different question. We do not reach it nor do we reach any aspects of the merits *viz.* whether, if petitioner be right in contending that his contract of enlistment was breached, habeas corpus is the appropriate remedy.

*Affirmed.*

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE STEWART dissents.

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thought sufficient in the English-speaking world to support the issuance of habeas corpus. . . .

"It [the Great Writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute; if he can prove his allegations this custody is in violation of the Constitution, and it was therefore error for the Court of Appeals to dismiss his case as moot instead of permitting him to add the Parole Board members as respondents."